



(24,417)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 673.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
APPELLANTS,

*vs.*

THE UNITED STATES, INTERSTATE COMMERCE COM-  
MISSION, CITY OF NASHVILLE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE MIDDLE DISTRICT OF TENNESSEE.

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No. \_\_\_\_\_

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# Supreme Court of the United States

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**LOUISVILLE & NASHVILLE RAILROAD COMPANY**  
**AND**  
**NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY**

**VS.**

**UNITED STATES OF AMERICA**

\_\_\_\_\_

Appeal in Equity from the District Court  
of the United States for the Middle District of Tennessee,  
Nashville Division.

\_\_\_\_\_

**RECORD.**

UNITED STATES OF AMERICA, MIDDLE DISTRICT  
OF TENNESSEE, NASHVILLE DIVISION.

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Record of the proceedings of the District Court of the United States within and for the Middle District of Tennessee, Nashville Division, in the cause and matter hereinafter stated.

Present: the Honorable John W. Warrington, United States Circuit Judge; Honorable John E. McCall, United States District Judge; and Honorable Edward T. Sanford, United States District Judge.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
*Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

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No. 21. In Equity.

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Said action was commenced on the 5th day of February, A.D. 1914, and proceeded to final disposition, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 5th day of February, 1914, the following petition was filed, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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In Equity.

---

No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
*Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

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PETITION.

*To the Honorable the Judges of the District Court of the United  
States, for the Middle District of Tennessee:*

The Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway exhibit this, their petition, against the United States of America, and thereupon say:

(1) Petitioner, Louisville & Nashville Railroad Company, is a corporation organized and existing under the laws of the State of Kentucky, and is now, and continuously for a long period of years heretofore has been, engaged as a common carrier in the transportation of interstate commerce.

Among the lines which it operates are lines extending from the coal fields of Western Kentucky to Nashville, Tennessee, to Memphis, Tennessee, and by themselves or in connection with other lines to Louisville, Kentucky.

Petitioner, Nashville, Chattanooga & St. Louis Railway, is a corporation organized and existing under the laws of the State of Tennessee, and is now, and continuously for a long period of years heretofore has been, engaged as a common carrier in the transportation of interstate commerce.

Among the lines which it operates are lines extending from the coal fields in Eastern Tennessee and Northern Alabama to Nashville, Tennessee, and to Chattanooga, Tennessee. The movement from certain mines located on its line in East Tennessee to Nashville is through the State of Alabama, and therefore interstate.

(2) On or about January 2, 1912, the Traffic Bureau of Nashville, Tennessee, filed with the Interstate Commerce Commission a complaint, copy of which is marked "Exhibit A," and is filed herewith and prayed to be read as part hereof, in which complaint a rate of one dollar (\$1.00) per ton on coal to Nashville, Tennessee, from Western Kentucky mines on the Louisville & Nashville Railroad and the Illinois Central Railroad, and from mines in Eastern Tennessee and in Alabama on the Nashville, Chattanooga & St. Louis Railway, was complained of as being unreasonable in and of itself, and relatively as compared with rates to such other cities as Chattanooga, Knoxville, and Memphis, Tennessee, Louisville and Covington, Kentucky, Cincinnati, Ohio, and East St. Louis, Illinois, as to petitioner Louisville & Nashville Railroad Company, and as compared with rates to Chattanooga, Tennessee, with respect to petitioner Nashville, Chattanooga & St. Louis Railway, and this complaint also attacked certain switching practices of petitioners at Nashville, Tennessee.

(3) Your petitioner, Louisville & Nashville Railroad Company, filed its answer to said complaint, copy of which is marked "Exhibit B," is filed herewith, and is prayed to be read as part hereof; and your petitioner, Nashville, Chattanooga & St. Louis Railway, filed its answer to said complaint, copy of which answer is marked "Exhibit C," is filed herewith, and is prayed to be read as part hereof: and by said answers put in issue the material allegations of the complaint.

(4) The proceeding instituted by the aforesaid complaint of the Traffic Bureau of Nashville, Tennessee, was known as Docket No. 4604 before the Interstate Commerce Commission, and hearings in said proceeding were held at Nashville, Ten-

nessee, on April 20, 21 and 22, and September 12, 13 and 14, 1912, and at Louisville, Kentucky, on November 1, 1912, and petitioners offer to produce and file as part hereof, marked "Exhibit D," a transcript of the record of said hearings when and if required so to do, the great size and volume of said record being justification for not filing the same at this time. Petitioners say that said transcript embraces all of the evidence which was introduced before the Interstate Commerce Commission in said proceedings and hearings.

(5) Petitioners say that the uncontradicted evidence introduced in said proceeding and hearings before the Interstate Commerce Commission shows, and it is true, that the rates complained of are reasonable both in and of themselves and relatively, and that the switching practices complained of are reasonable, just and lawful. Petitioners say that there was no evidence of any kind introduced before the Interstate Commerce Commission showing, or tending to show, that the rates, or any of the rates complained of, were unreasonable, unjust, unduly discriminatory, or otherwise unlawful, and that there was no evidence introduced before the Interstate Commerce Commission showing, or tending to show, that the switching practices complained of were in any wise unreasonable, unjust, or in any other way unlawful.

(6) Thereafter, regardless of and in direct conflict with the uncontroverted facts established in said proceeding, the Interstate Commerce Commission made a report in writing, together with certain orders in respect thereto, copies of which report and orders are filed herewith marked "Exhibit E," and are prayed to be read as part hereof.

This report is published in the twenty-eighth volume of the Interstate Commerce Reports, in which volume it appears on pages 533 to 542, inclusive; and therein the Interstate Commission without warrant of law or of fact found:

(a) That the fact that the rate on steam coal to Nashville, Tennessee, was \$1.00 per ton, and had remained unchanged throughout a twenty-five year existence, was a circumstance showing or tending to show that a rate of \$1.00 per ton on all coal is now unreasonable.

(b) That there is no water competition on coal at Memphis, Tennessee, and that, although there is railroad competition at Memphis, which does not exist at Nash-

ville, such railroad competition at Memphis does not create such a dissimilarity of conditions affecting the transportation of coal as to preclude a comparison of the rates from the Western Kentucky mines to Memphis and to Nashville, respectively, because of a *conjectural* competition which the Commission, without warrant or authority of law or fact, assumed ought to exist at Nashville, Tennessee.

(c) That similarly water competition at Louisville is not a compelling factor, with respect to coal rates to that city, and that rail competition at Louisville, which does not exist at Nashville, does not create such a dissimilarity of conditions affecting the transportation of coal as to preclude a comparison of the rates from the same fields to Louisville and to Nashville, Tennessee.

(d) That, as to petitioner, Louisville & Nashville Railroad Company, the existing rate on coal to Nashville, Tennessee, from Western Kentucky mines on its Owensboro and its Henderson Divisions is unreasonable, and that a reasonable rate to Nashville from the Louisville & Nashville Western Kentucky mines on its Owensboro and its Henderson Divisions, should not exceed 80 cents per ton.

(e) That as to petitioner, Nashville, Chattanooga & St. Louis Railway, the existing rate on coal to Nashville, Tennessee, from Eastern Tennessee and Alabama mines is unreasonable, and that a reasonable rate to Nashville from said mines should not exceed 90 cents per ton.

(f) That the Interstate Commerce Commission has power to require a common carrier to give the use of petitioners' tracks or terminal facilities to another carrier engaged in like business.

(g) That the tariffs of the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company unjustly discriminate against shippers of coal from the Tennessee Central Railroad, and unduly prefer shippers of coal from the lines each of the other, and that a just and reasonable practice with respect to switching at Nashville requires the switching of coal from the interchange of each carrier to industries on the rails within the terminals of the other.

And said report containing the findings of fact made by the Interstate Commerce Commission, and the Interstate Commerce Commission's unwarranted conclusions thereon, were referred to and made a part of the orders of the Interstate Commerce Commission with respect thereto, the substantive portions of said orders being as follows, to-wit:

*"It is ordered,* That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required to cease and desist, on or before January 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tennessee.

*"It is further ordered,* That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tenn., rates not in excess of 80 cents per ton.

*"It is further ordered,* That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal to Nashville, Tenn., from mines on its roads in Alabama and in Tennessee, the movement from which is through Alabama.

*"It is further ordered,* That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby notified and required to establish on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads to Nashville, Tenn., from mines on its road in Alabama, and in Tennessee the movement from which is through Alabama, rates not in excess of 90 cents per ton.

*"It is further ordered,* That the above-named defendants be, and they are hereby notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from their



present practice with respect to interswitching interstate carload shipments of coal at Nashville, Tenn.

*"It is further ordered,* That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter, to abstain, from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.

*"And it is further ordered,* That said defendants be, and they are hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the interswitching of interstate carload shipments of coal at Nashville, Tenn., a practice which will permit the interswitching of such shipments from and to the lines of each and every defendant."

Petitioners further say that the facts in said proceeding were undisputed; that there was no substantial evidence before the Commission to support its said orders, but that said orders proceeded from a misconstruction of the Act to Regulate Commerce as applicable to the conditions which were shown to exist; that the Commission in its said report and orders was inconsistent, because it stated that comparisons of any kind to be effective must be analogous or nearly so, and, nevertheless, based its conclusions upon comparisons which were not analogous either in whole or in part; that the said orders of the Commission are beyond the limits of the power delegated by the acts of Congress to the Commission, and that the said orders of the Commission, even if in form within its delegated power, are the result of so unreasonable an exercise of said power that they are in substance beyond it.

Petitioners further say that should said orders remain and continue in effect the annual loss to each of petitioners resulting

therefrom will amount to many thousands of dollars. Accordingly, petitioners aver that the matter and amount in dispute in this proceeding as to each of them far exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interests and costs.

And petitioners further say that the enforcement of said orders of the Interstate Commerce Commission will result in taking their property without due process of law, in contravention of the Constitution of the United States, and more particularly in contravention of the Fifth Amendment thereto.

Petitioners further say that this is a suit to suspend and set aside an order of the Interstate Commerce Commission, of which formerly, in accordance with Section 207 of the Judicial Code, the Commerce Court had jurisdiction, and that by an Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the fiscal year 1913, and for other purposes (H. R. 7898) the venue of this suit is now in this Honorable Court.

(8) Your petitioners further say that the Interstate Commerce Commission, in making said report and orders, acted in a capricious and unreasonable manner, exceeded the authority delegated to it by Congress, and erred as a matter of law in the following particulars:

(a) The findings and orders made by the Commission were wholly without substantial evidence to support them.

(b) The findings and orders made by the Commission were contrary to the indisputable character of the evidence.

(c) The facts found by the Commission do not as a matter of law support the orders made by it.

(d) The Commission was without jurisdiction to make the orders.

(e) The enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law and will result in the taking of petitioners' property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

(9) Petitioners further aver that, unless the orders complained of herein be set aside and annulled upon final hearing by this Honorable Court of this suit, and unless their operation be restrained and suspended by this Honorable Court immediately and pending the final hearing and determination of

this suit, petitioners will, by reason of the enormous penalties provided by the Act to Regulate Commerce for failure to comply with an order of the Interstate Commerce Commission, be compelled to put said orders into effect, and that such action will result in irreparable loss to petitioners and will particularly result in a loss of the coal traffic of petitioner Louisville & Nashville Railroad Company to Nashville, Tennessee, of more than Ninety Thousand Dollars (\$90,000.00) per year, and in a loss on the coal traffic of petitioner Nashville, Chattanooga & St. Louis Railway to Nashville, Tennessee, of more than Five Thousand Dollars (\$5,000.00) per year, and will further result in the confiscation of terminal facilities of petitioners at Nashville, and in the taking of the property represented by said terminals without due process of law, by requiring petitioners, and each of them, to give the use of their tracks and terminals to another carrier engaged in like business; and that the enforcement of said orders of the Interstate Commerce Commission will result in the loss of many thousands of dollars annually to your petitioners, and to each of them, and will subject your petitioners to great loss and damage and irreparable injury; for all of which your petitioners are without adequate remedy at law.

*In consideration whereof*, Petitioners pray that said orders of the Interstate Commerce Commission may be wholly enjoined, set aside, and annulled, and that a preliminary injunction may be awarded restraining the enforcement thereof, and that such other further and full relief may be granted as the case requires.

And to this end petitioners pray that the United States of America may be made a party defendant to this petition, and required to answer its allegations, an answer under oath being now expressly waived.

And as in duty bound, the petitioner will ever pray, etc.

(Signed:) JNO. B. KEEBLE,

WILLIAM A. COLSTON,

WILLIAM A. NORTHCUTT,

*Solicitors for the Louisville & Nashville  
Railroad Company.*

CLAUDE WALLER,

*Solicitor for Nashville, Chattanooga  
& St. Louis Railway.*

UNITED STATES OF AMERICA, }  
JEFFERSON COUNTY, } Set.  
STATE OF KENTUCKY.

Personally appeared before me, G. W. B. Olmstead, a Notary Public in and for the aforesaid State and County, C. B. Compton, who, first being duly sworn, deposes and says:

That he is Freight Traffic Manager of the Louisville & Nashville Railroad Company, petitioner in the foregoing petition; that he has read the foregoing petition, and knows the contents thereof, and that the matters therein stated are true.

(Signed:) C. B. COMPTON.

Subscribed and sworn to before me this 4th day of February, 1914. My commission as Notary Public expires on the 23d day of January, 1918.

In witness whereof, I have hereunto signed my name and affixed my notarial seal, this 4th day of February, A. D. 1914.

(Signed:) G. W. B. OLMSTEAD,  
(SEAL) *Notary Public, Jefferson County, Ky.*

“EXHIBIT A”

Before the

INTERSTATE COMMERCE COMMISSION.

---

THE TRAFFIC BUREAU OF NASHVILLE, TENNESSEE, *Complainant.*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
THE LOUISVILLE & NASHVILLE TERMINAL COMPANY,

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

ILLINOIS CENTRAL RAILROAD COMPANY, and

TENNESSEE CENTRAL RAILROAD COMPANY,

*Defendants.*

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The complaint of the Traffic Bureau of Nashville, Tennessee, respectfully shows to this Honorable Commission as follows:

SECTION I.

That complainant is an association composed of merchants, manufacturers and shippers of the City of Nashville, and is a corporation duly created and organized under the laws of the State of Tennessee; that it has a President and Board of Directors; that the particular purposes of its charter are:

“Those of forwarding and protecting the interests of the merchants and shippers of the City of Nashville, Tennessee, as well as their patrons in all matters connected with the receiving and shipment of freight, freight rates and transportation, and embracing all business, and all manner of claims against common carriers in which said merchants, shippers and patrons may be concerned; and also in connection therewith for the purpose of furnishing any such common carrier from time to time

with information about shipments of freight to and from said City of Nashville, of the character best to insure its proper classification; of procuring such freight rates to and from all shipping points as shall prevent discrimination against shippers and patrons of Nashville, and aid them in improving and extending trade; of assisting in the adjustment and collection of claims for overcharges and damages, or either, against any common carrier, or other person liable therefor; of rendering to its members individually and collectively its service in all matters touching the transportation of goods, wares, merchandise, grain, lumber and all other products; of procuring special rates for commercial travelers, and generally of taking all proper steps and using all fair and honorable means for the extension of the trade of said City of Nashville, and of doing and performing all services and duties in reference to these subjects, as is conferred by law in a charter of a Board of Trade, or a Chamber of Commerce, in that behalf, for such purposes.”

And this complaint is made and filed on behalf of complainant and its members, and all other shippers, manufacturers and consumers of coal in the City of Nashville and its vicinity who may desire to come in and be made parties hereto.

## SECTION II.

That the above named defendants are common carriers engaged in the transportation of passengers and property wholly by rail from points in the States of Illinois, Kentucky, Alabama and Virginia to Nashville and other points in the State of Tennessee, and from points in Tennessee through the States of Alabama and Kentucky to Nashville, Tennessee, and other points in the State of Tennessee, and as such common carriers are subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof and supplementary thereto; and that each of the above named defendants are engaged in the carriage, transportation, switching and handling of all classes or kinds of bituminous coal, from points on their respective lines, in the States of Illinois, Kentucky, Virginia and Alabama, either separately or jointly in connection with each other from said points to Nashville, Tennessee.

## SECTION III.

That the Louisville & Nashville Railroad Company is a railroad corporation duly created and organized under the laws

of the State of Kentucky, and that it controls the Nashville, Chattanooga & St. Louis Railway through ownership of \$7,177,600 out of a total of \$10,000,000 of the outstanding capital stock.

That the defendant, the Louisville & Nashville Railroad Company, has in effect and has filed with this Honorable Commission tariffs whereby it charges and collects for the transportation of coal from various points in the State of Kentucky to Nashville, Tennessee, the rate of \$1.00 per net ton.

L. & N. Tariff G. F. O. No. 1275, I. C. C. No. A-11505, effective June 5, 1910, and supplement No. 23 to L. & N. R. R. G. F. O. No. 1273, which is supplement No. 12 to I. C. C. No. A-11505, which cancels supplement No. 11 to I. C. C. No. A-11505, and contains all changes effective November 29, 1911.

From—	To Nashville	Miles	Rate
Arnold, Ky. ....	"	141	\$1.00
Barnsly, Ky. ....	"	...	1.00
Clay, Ky. ....	"	132	1.00
Earlington, Ky. ....	"	104	1.00
Empire, Ky. ....	"	90	1.00
Hamner, Ky. ....	"	146	1.00
Madisonville, Ky. ....	"	108	1.00
Mannington, Ky. ....	"	92	1.00
Morton ....	"	100	1.00
Morganfield, Ky. ....	"	150	1.00
Nebo, Ky. ....	"	117	1.00
New Empire, Ky. ....	"	...	1.00
Nortonville, Ky. ....	"	97	1.00
Providence, Ky. ....	"	124	1.00
Pride, Ky. ....	"	138	1.00
Robards, Ky. ....	"	134	1.00
Sebree, Ky. ....	"	129	1.00
Shrote, Ky. ....	"	145	1.00
Williams, Ky. ....	"	136	1.00

That the average distance haul of coal to Nashville, Tennessee, from the above-named points as shown where distances are given in the official guide is 122½ miles.

That the bulk of the coal shipped from the above named points to Nashville, Tennessee, is shipped from the following points, distanced from Nashville as follows:

From—	To Nashville	Miles
Earlington, Ky. ....	"	104
Empire, Ky. ....	"	90
Madisonville, Ky. ....	"	108
Nortonville, Ky. ....	"	97
Total miles .....		399

That the average distance haul of coal to Nashville from the last-named points is 100 miles; also,

L. & N. Coal Tariff, G. F. O. No. 1541, I. C. C. No. A-11506, effective June 5, 1910, and

Supplement No. 12 to L. & N. G. F. O. No. 1541, same as supplement No. 8 to I. C. C. No. A-11506, effective November 29, 1911, cancels supplement No. 7 to I. C. C. No. A-11506, and contains all changes, from mines on Owensboro and Nashville Divisions to points in Tennessee and other States.

From—	To Nashville via Guthrie, Ky.	Miles
Beech Creek Junction, Ky. ....	" "	...
Bevier, Ky. ....	" "	103
Browder, Ky. ....	" "	98
Central City, Ky. ....	" "	107
Cleaton, Ky. ....	" "	104
Elk Valley, Ky. ....	" "	...
Island, Ky. ....	" "	118
Mud River, Ky. ....	" "	96
South Carrollton, Ky. ...	" "	110

That the average distance haul of coal to Nashville, Tennessee, from the above named points, via Guthrie, Ky., the short line as shown, where distances are given in the official guide, is 105 miles.

That the bulk of the coal that comes to Nashville is shipped from the following points, distanced from Nashville as follows:

From—	To Nashville	Miles
Bevier, Ky. ....	"	103
Mud River, Ky. ....	"	96
Total miles .....		199



That the average distance haul of coal to Nashville, Tennessee, from said last two mentioned points is 100 miles.

That each of the above named rates are excessive, unreasonable and unjust, and in violation of the provisions of the Act to Regulate Commerce, particularly Section 1 thereof, and that reasonable and just rates for such transportation from said shipping points to Nashville, Tennessee, should not exceed 50 cents per net ton.

#### SECTION IV.

That the manufacturers and consumers of steam coal at Nashville, Tennessee, compete in the sale of their manufactured products with the following named among other cities:

Chattanooga, Knoxville and Memphis, Tennessee; Louisville and Covington, Ky.; Cincinnati, Ohio; East St. Louis, Ill., and Birmingham, Ala.

That all of said cities have a much lower rate on steam coal especially, and also a lower rate on all other kinds of coal than is accorded Nashville by the defendant, the Louisville & Nashville Railroad Company.

That the Louisville & Nashville Railroad Company, for rate-making purposes, divides the coal-producing and shipping points upon its line in Kentucky into Eastern and Western Mines.

That the points in Kentucky on its lines, which carry the rate of \$1.00 per ton to Nashville, as shown in Section III of this complaint, are what are known as its Western Kentucky mines.

That defendant, the Louisville & Nashville Railroad Company, by two tariffs duly published and filed with this Honorable Commission, the same being: L. & N. R. R. Tariff G. F. O. No. 1273, I. C. C. No. A-11505, effective June 5, 1910, and supplement No. 23 to L. & N. R. R. G. F. O. No. 1273, which is supplement No. 12 to I. C. C. No. A-11505, effective November 29, 1911, which cancels supplement No. 11 to I. C. C. No. A-11505, charges and collects for the transportation from the same points, as shown in same tariff in Section III of this complaint, to Louisville, Kentucky, on the same kind of coal, a rate of 60 cents a ton, for an average haul to Louisville of 234 miles, making an average rate per ton per mile of 2.6 mills; also under L. & N. Tariff No. G. F. O. 1541, I. C. C. No. A-11506, effective June 5, 1910, and supplement No. 12 to

L. & N. Tariff G. F. O. No. 1541, which is supplement No. 8 to I. C. C. No. A-11506, effective November 29, 1911, which cancels supplement No. 7 to I. C. C. No. A-11506, from the same points as shown in same tariff in Section III of this complaint, to Louisville, Kentucky, on the same kind of coal, a rate of 60 cents a ton for an average distance haul to Louisville of 177½ miles, making an average rate per ton per mile of 3.4 mills.

That the defendant, the Louisville & Nashville Railroad Company, under its tariff hereinabove described in this section, viz: I. C. C. No. A-11505 and supplements thereto, publishes a rate to Memphis from the points specified therein, of one dollar and ten cents (\$1.10) per net ton on same kinds of coal for an average distance haul of 286 miles, making an average rate per ton per mile of 3.8 mills.

That under its Tariff I. C. C. A-11506, and supplements thereto, it publishes a rate to Memphis from the points specified therein of one dollar and ten cents (\$1.10) per net ton, on same kind of coal for an average distance haul of 271½ miles, making an average rate per ton per mile of 4 mills.

That said rate of one dollar and ten cents per net ton to Memphis, hereinabove refererd to, is an advanced rate, which became effective April 1, 1911, over a former rate of one dollar per net ton from said points to Memphis, which dollar rate had been in effect prior to the advance of April 1, 1911, and which advanced rate of one dollar and ten cents per net ton is now in question before this Honorable Commission as to its reasonableness, by the Memphis Freight Bureau, in case No. 3997 on the Commission's Docket.

That the defendant, the Louisville & Nashville Railroad Company, under its Tariff I. C. C. A-11506, and supplement thereto, publishes a rate to East St. Louis, Illinois, from the points specified therein, of one dollar per net ton on same kinds of coal for an average distance haul of 228 miles, making an average rate per ton per mile of 4.4 mills.

That under its Tariff I. C. C. No. A-11506, and supplements thereto, it publishes a rate to East St. Louis, Illinois, from the points specified therein of one dollar and ten cents per net ton, for an average distance haul of 327½ miles, making an average rate per ton per mile of 3.4 mills.

That the defendant, the Louisville & Nashville Railroad Company, from its Eastern mines in Kentucky, Tennessee and Virginia, under its tariff, viz:

L. & N. Coal Tariff G. F. O. No. 1564, I. C. C. No. A-11536 effective August 1, 1910, on coal from mines on Louisville & Nashville Railroad in Kentucky, Tennessee and Virginia, to stations on Louisville & Nashville and other railroads shown in tariff in States of Kentucky and Tennessee, and supplement No. 18 to L. & N. Tariff G. F. O. No. 1564, same as supplement No. 9 to I. C. C. No. A-11536, effective interstate June 15, 1911, which cancels supplement No. 3 to I. C. C. No. A-11536, and supplement No. 24 to L. & N. G. F. O. No. 1564, same as supplement No. 13 to I. C. C. No. A-11536, effective interstate November 1, 1911, which cancels supplement No. 12 to I. C. C. No. A-11536.

Publishes rates on coal, per net ton, to Louisville and Covington, Kentucky, and Cincinnati, Ohio, from the points specified therein as follows:

To—	From Groups			
	1	2	3	4
Cincinnati, Ohio, all kinds . . . . .	\$1.00	\$0.95	\$0.90	\$0.80
Covington, Ky., all kinds . . . . .	.90	.85	.80	.70
Louisville, Ky., Note A . . . . .	.85	.75	.75	.65
Louisville, Ky., Note B . . . . .	.95	.85	.85	.75
Louisville, Ky., Note C . . . . .	1.05	.95	.95	.85

Note A applies on slack coal or nut and slack coal mixed.

Note B applies on run of mine coal.

Note C applies on all other kinds of coal.

That the average distance haul to Cincinnati from Groups No. 1 is 286 miles; No. 2, 230 miles; No. 3, 218 miles, and No. 4, 167 miles, making an average rate per ton per mile from Groups No. 1 of 3.5 mills; No. 2 of 4.1 mills; No. 3 of 4.1 mills, and No. 4 of 4.8 mills.

That the average distance haul to Covington, Ky., from Groups No. 1 is 284 miles; No. 2, 228 miles; No. 3, 216 miles, and No. 4, 165 miles, making an average rate per ton per mile from Groups No. 1 of 3.2 mills; No. 2 of 3.7 mills; No. 3 of 3.7 mills, and No. 4 of 4.3 mills.

That the average distance haul to Louisville from Groups No. 1 is 271 miles; No. 2, 215 miles; No. 3, 203 miles, and No. 4, 152 miles, making an average rate per ton per mile from Group No. 1 on coal described in Note A of 3.1 mills; on coal described in Note B of 3.5 mills, and in Note C of 3.9 mills.

From Group 2 on coal described in Note A, 3.5 mills; Note B, 4 mills; Note C, 4.4 mills.

From Group No. 3 on coal described in Note A, 3.7 mills; Note B, 4.2 mills; Note C, 4.7 mills.

From Group No. 4 on coal described in Note A, 4.3 mills; Note B, 4.9 mills; Note C, 5.6 mills.

That the defendant, the Louisville & Nashville Railroad Company, in its Tariff G. F. O. No. 1794, I. C. C. No. A-12088, effective October 15, 1911, and supplement No. 2 to L. & N. R. R. Tariff G. F. O. No. 1794, which is supplement No. 2 to I. C. C. No. A-12088, which cancels supplement No. 1 to I. C. C. No. A-12088, effective December 15, 1911, publishes rates on coal per net ton to Knoxville, Tennessee, from the points specified therein as follows:

	From Groups			
	1	2	3	4
Slack, Pea and "Steam Nut"				
straight or mixed C. L. and				
three-inch steam .....	\$0.40	\$0.45	\$0.50	\$0.60
All other kinds .....	.60	.65	.70	.80

That the average distance haul to Knoxville, Tennessee, from points in Group No. 1 is 38 miles; No. 2, 41 miles; No. 3, 113 miles, and No. 4, 119 miles, making an average rate per ton per mile on slack, pea and "steam nut" straight or mixed carload and "three-inch steam" coal from Group No. 1 of 10.5 mills; No. 2 of 11 mills; No. 3 of 4.4 mills, and No. 4 of 5 mills, and on all other kinds of coal from Group No. 1 of 15.6 mills; No. 2 of 15.9 mills; No. 3 of 6.2 mills, and No. 4 of 6.7 mills.

That in the same tariff it publishes rates on coal to Chattanooga, Tennessee, in connection with the Western & Atlantic Railroad, via Cartersville, Georgia, from the points specified therein as follows:

From Group No. 1, \$1.15; No. 2, \$1.15; No. 3, \$1.15; No. 4, \$1.25 per net ton.

That the average distance haul to Chattanooga, Tennessee, from points in Group No. 1 is 275 miles; No. 2, 298 miles; No. 3, 350 miles, and No. 4, 356 miles, making an average rate per ton per mile on all kinds of coal from Group No. 1 of 4.2 mills; No. 2 of 3.9 mills; No. 3 of 3.3 mills, and No. 4 of 3.5 mills.

That the defendant, the Louisville & Nashville Railroad Company, does not publish rates on coal from either its Eastern or Western mines to Birmingham, Alabama.

### SECTION V.

That the rate of \$1.00 per ton on coal charged by the defendant, the Louisville & Nashville Railroad Company, from its Western mines or points in Kentucky to Nashville, Tennessee, as shown in Section III of this complaint, is unjust and unreasonable in itself to complainant and the shippers and consumers of coal in Nashville, Tennessee, and is relatively unjust and unreasonable as compared with the rates established and charged on coal by this defendant to Memphis, Tennessee; Louisville, Kentucky, and East St. Louis, Illinois, from the same mines or points as shown in Section IV of this complaint, and is in violation of Section 1 of the Act to Regulate Commerce, and that reasonable and just rates for such transportation from said shipping points to Nashville, Tennessee, should not exceed 50 cents per net ton.

That said rates and charges as established by this defendant give undue and unreasonable preference and advantage to the cities of Memphis, Tennessee; Louisville, Kentucky, and East St. Louis, Illinois, and the coal traffic thereto, and subjects complainant and the shippers and consumers of coal at Nashville; and the coal traffic thereto; and Nashville, itself, to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act to Regulate Commerce.

### SECTION VI.

That the rates charged by the defendant, the Louisville & Nashville Railroad Company, from Groups 1, 2, 3 and 4, from its Eastern mines in Kentucky, Virginia and Tennessee, to Cincinnati, Ohio; Covington and Louisville, Ky., on coal, as shown in Section IV of this complaint, are as compared with the rate of \$1.00 per ton charged complainant from its Western mines or points to Nashville, Tennessee, as shown in Section III of this complaint, unjust and unreasonable, and give undue and unreasonable preference and advantage to the cities of Cincinnati, Ohio, and Covington and Louisville, Kentucky, the shippers and consumers of coal therein, and the coal traffic itself, and subject complainant, the shippers and consumers of coal in Nashville, the City of Nashville itself, and the coal traffic thereto, to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Act to Regulate Commerce.

## SECTION VII.

That the rates charged by the defendant, the Louisville & Nashville Railroad Company, from Groups 1, 2, 3 and 4, from its Eastern mines in Kentucky, Virginia and Tennessee, to Chattanooga and Knoxville, Tennessee, on coal, as shown in Section IV of this complaint are, as compared with the rate of \$1.00 per ton charged complainant from its Western mines or points, as shown in Section III of this complaint, to Nashville, Tennessee, unjust and unreasonable, and give undue and unreasonable preference and advantage to the cities of Chattanooga and Knoxville, Tennessee, the shippers and consumers of coal therein, and the coal traffic itself; and subject complainant, the shippers and consumers of coal in Nashville, Tennessee; the City of Nashville itself, and the coal traffic thereto, to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Act to Regulate Commerce.

## SECTION VIII.

That the rate of \$1.00 per net ton established by the defendant, the Louisville & Nashville Railroad Company, on coal from points on its line in Western Kentucky to Nashville, Tennessee, as aforesaid, makes an average rate per ton per mile of 10 mills, or 1 cent, which rate is greatly in excess of its rates per ton on coal to all other large consuming points on its line of road from all of its coal-producing points, as well as to all other large consuming points throughout the United States, and is therefore excessive, unreasonable and unjust, and in violation of the provisions of the Act to Regulate Commerce, particularly Section 1 thereof.

That said rate of \$1.00 per net ton on coal to Nashville, as hereinabove described, gives undue and unreasonable prejudice and advantage to all other coal-consuming points on its lines, the coal traffic thereto, and the coal consumers therein; and subject the complainant, the City of Nashville itself, the coal traffic thereat, and the shippers and consumers of coal therein, to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Act to Regulate Commerce.

All of which greatly injures complainant, the City of Nashville itself, the shippers and consumers of coal therein, by requiring them to pay more for the commodity of coal than the cities of Memphis, Knoxville and Chattanooga, Tennessee; Louisville and Covington, Kentucky; East St. Louis, Illinois;

Cincinnati, Ohio, and all other large consuming points, and by depriving the City of Nashville and the shippers and consumers of coal therein, and the coal traffic at Nashville, of its and their rights to compete upon equal terms with said above-mentioned markets and all other competing markets, with their manufactured products, and by preventing the location of manufacturing industries in the City of Nashville, Tennessee, many of which, against their natural selection, are driven to the competitive cities above mentioned by reason of this unjust discrimination against Nashville, the shippers and consumers of coal therein, and this complainant.

### SECTION IX.

That the Nashville, Chattanooga & St. Louis Railway is a railroad corporation duly created and organized under the laws of the State of Tennessee, with a capital stock of \$10,000,000.

That in the year 1880 the Louisville & Nashville Railroad Company acquired 55 per cent of the capital stock of this company, and on June 30, 1909, the said Louisville & Nashville Railroad Company owned seventy-one and seventy-eight hundredths per cent, or seven million one hundred and seventy-seven thousand six hundred dollars out of the total of ten million dollars capital stock.

That the defendant, the Nashville, Chattanooga & St. Louis Railway, has in effect and has filed with this Honorable Commission a tariff whereby it charges and collects, for the transportation of coal, from various points in the States of Alabama and Tennessee, to Nashville, Tennessee, the rate of \$1.00 per net ton.

N., C. & St. L. Coal and Coke Tariff No. 3, I. C. C. No. 1781-A, effective November 22, 1909, and supplement No. 7 to I. C. C. No. 1781-A, effective May 27, 1911, which contains all changes from Whitwell, Montague, Orme, College, Dunlap, Daus, Victoria, Whiteside, Shellmound, South Pittsburg, Pikeville, Lee, Tennessee, and Carlisle and Stevenson, Alabama.

That in the handling, carriage and transportation of coal, from the points in the State of Tennessee hereinabove shown, said coal passes through the State of Alabama when shipped therefrom to Nashville, Tennessee, over defendant's line.

As follows: To Bridgeport, Alabama, thence through the State of Alabama to Stevenson, Alabama, thence to Bass, Alabama, and thence to Nashville, Tennessee.

That from Carlisle and Stevenson, Alabama, said coal is transported by this defendant from said points to Nashville, Tennessee.

That each of the above named rates are excessive, unreasonable and unjust, and are in violation of the Act to Regulate Commerce, particularly Section 1 thereof; and that reasonable and just rates for such transportation from said shipping points to Nashville, Tennessee, should not exceed 50 cents per net ton.

### SECTION X

That the defendant, the Nashville, Chattanooga & St. Louis Railway, in said Tariff I. C. C. No. 1781-A, effective November 22, 1909, and supplement No. 7 to I. C. C. No. 1781-A, effective May 27, 1911, which cancels supplement No. 6 to I. C. C. No. 1781-A, charges and collects on coal car load to Chattanooga, Tennessee, the following rates per net ton from Bon Air, Tennessee, 75 cents; DeRossett, Tennessee, 75 cents; Clifty, Tennessee, 75 cents; Eastland, Tennessee, 75 cents; Ravenscroft, Tennessee, 75 cents; Tracy City, Tennessee, 70 cents; Sewanee, Tennessee, 70 cents; Whitwell, Tennessee, 60 cents; Montague, Tennessee, 60 cents; Orme, Tennessee, 60 cents; College, Tennessee, 60 cents; Dunlap, Tennessee, 60 cents; Daus, Tennessee, 60 cents; Victoria, Tennessee, 60 cents; South Pittsburg, Tennessee, 60 cents; Stevenson, Alabama, 60 cents; Pikeville, Tennessee, 70 cents; Lee, Tennessee, 70 cents.

That in the handling, carriage and transportation of coal from the points in the State of Tennessee hereinabove shown, said coal passes through the State of Alabama when shipped therefrom to Chattanooga, Tennessee, over defendant's line, from said points before reaching Chattanooga, Tennessee.

That the average distance haul from Chattanooga, Tennessee, from points mentioned above, is 87 miles, making an average rate per ton per mile of 8.7 mills.

That the bulk of the coal shipped from the above named points to Chattanooga, Tennessee, is shipped from Bon Air and Ravenscroft, Tennessee, an average distance haul of 154 miles, making an average rate per ton per mile of 4.9 mills.

### SECTION XI.

That the rate of \$1.00 per net ton charged on coal by the defendant, the Nashville, Chattanooga & St. Louis Railway,



from its mines or points in Alabama and Tennessee to Nashville, Tennessee, as shown in Section IX of this complaint, is unjust, and unreasonable in itself to complainant and the shippers and consumers of coal in Nashville, Tennessee, and is relatively unjust and unreasonable as compared with the rates established and charged on coal by this defendant to Chattanooga, Tennessee, from the same mines or points, as shown in Section X of this complaint, and is in violation of Section 1 of the Act to Regulate Commerce, and that reasonable and just rates for such transportation from said shipping points to Nashville, Tennessee, should not exceed 50 cents per net ton.

That said rates and charges as established by this defendant give undue and unreasonable preference and advantage to the City of Chattanooga, Tennessee the shippers and consumers of coal therein, and the coal traffic itself; and subject complainant, the shippers and consumers of coal in Nashville, Tennessee, the City of Nashville itself, and the coal traffic thereto, to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Act to Regulate Commerce.

## SECTION XII.

That the Illinois Central Railroad Company is a railroad corporation duly created and organized under the laws of the State of Illinois.

That the Tennessee Central Railroad Company is a railroad corporation duly created and organized under the laws of the State of Tennessee, and was chartered under said laws April 30, 1902.

That the defendant, the Illinois Central Railroad Company, has in effect and has filed with this Honorable Commission its tariff, whereby it, in connection with the defendant, the Tennessee Central Railroad Company, charges and collects for the transportation of coal from various points in the State of Kentucky to Nashville, Tennessee, the rate of \$1.00 per net ton, in:

I. C. R. R. Tariff No. 1550, I. C. C. No. E-1059, effective September 20, 1909, and supplement No. 18 to I. C. C. No. E-1059, effective July 12, 1911, which cancels supplement Nos. 13 and 17 to I. C. C. No. E-1059, and supplement No. 19 to I. C. C. No. E-1059, effective July 17, 1911. Supplements Nos. 18 and 19 contain all changes, from mines and stations, shown on page 3 of tariff from Groups 1, 2 and 3.

From Group 1 Points in Ky.	Miles via Hopkinsville, Ky.	From Group 1 Points in Ky.	Miles via Hopkinsville, Ky.
Makersport .....	152	Isley .....	136
Beaver Dam .....	188	Luzerne .....	161
Central City .....	170	McHenry .....	185
Daniel Boone .....	142	McNary .....	153
Dawson .....	131	Mercer .....	166
Depoy .....	159	Nelson .....	175
Dovey .....	...	Nortonville .....	145
Echols .....	180	Oakland Mines ....	...
Fox Run .....	...	Render .....	185
Gibraltar .....	...	Rockport .....	180
Gish .....	...	St. Charles .....	139
Graham .....	157	Simmons .....	183
Greeneville .....	163	Taylors .....	...
Hamby .....	137	White Plains .....	149
Hillside .....	165	Williams .....	...
From Group 2 Points in Ky.	Miles via Hopkinsville, Ky.	From Group 2 Points in Ky.	Miles via Hopkinsville, Ky.
Deaneville .....	221	Gaines .....	...
Foardsville .....	215	Reynolds .....	219
From Group 3 Points in Ky.	Miles via Hopkinsville, Ky.	From Group 3 Points in Ky.	Miles via Hopkinsville, Ky.
Belle Union Mines (Dekoven) .....	166	Providence .....	169
Blackford .....	153	Sturgis .....	161
Clay .....	161	Sullivan .....	157
Corydon .....	194	Uniontown .....	187
Dekoven .....	166	Waverly .....	187
Highland .....	...	Weaverton .....	204
Montezuma .....	164	Wheatcroft .....	158
Morganfield .....	181		

### SECTION XIII.

That coal is low class tariff, and, as such, much below the average classification, in fact upon the lines of the defendants it takes special rates.

That there is approximately shipped into Nashville, Tennessee, annually 600,000 tons of coal; that the bulk of this coal tonnage is interstate movement, the same coming from the Western Kentucky mines, located upon the line of the defendant, the Louisville & Nashville Railroad Company, and comes entirely in carload lots, the same being loaded by the consignor, and the cars are loaded to their full carrying capacities; coal is of relative low value compared with its bulk and weight; it is neither fragile nor perishable, and is exposed to but slight risk of damage or loss in transportation.

The movement of coal into Nashville is constant and constitutes by far the largest local tonnage consumed at Nashville.

The cars used in the transportation of coal, relatively speaking, taking into consideration the tonnage capacity of the same, are the least expensive cars constructed and used by carriers for the transportation of freight.

Because of these and other facts, coal is inexpensively handled, and should bear the lowest rate consistent with a fair compensation to the carrier for the service rendered, the rate per ton per mile should be greatly lower than the average for all commodities.

The following are the average rates per ton per mile on all traffic of the defendants railway companies for the year 1910, as shown in Poor's Manual for 1911:

Louisville & Nashville .....	7.5 mills
Nashville, Chattanooga & St. Louis.....	9.9 mills
Illinois Central .....	5.89 mills
Tennessee Central .....	13.29 mills
Average .....	9.15 mills

The rate per ton per mile on all traffic for the year ending June 30, 1909, for all of the railways in Group 5, consisting of the States of Kentucky, Tennessee, Georgia, Florida, Alabama and Mississippi was 8.24 mills.

The tonnage of coal greatly exceeds that of any other commodity.

For the year 1910 the tonnage of coal for the defendant's railway companies herein was greatly in excess of the tonnage of any other commodity transported by them.

For the year ending June 30, 1909 (Statistics of Railways in United States, 1909, the latest obtainable), the tonnage of bituminous coal exceeded that of any other commodity on all the railways throughout the entire United States.

The total tonnage of all the commodities on all the railways was 826,492,765 tons, of which coal constituted 26½ per cent.

The following table shows summary of selected commodities for the year ending June 30, 1909, in the United States:

MILEAGE REPRESENTED ON JUNE 30, 1909.\*

118,423.69 Miles.

COMMODITY.	Freight carried in carload lots.	Ton-mileage of freight carried in carload lots.	Revenue from freight carried in carload lots.	Average receipts per ton per mile from freight carried in carload lots.
	TONS.	TON MILES.		CENTS.
Grain . . .	28,279,121	6,311,659,929	\$38,583,377	0.611
Hay . . . .	4,650,064	750,121,405	7,690,364	1.025
Cotton . .	3,793,428	805,837,978	14,352,854	1.781
Live stock.	10,369,251	2,426,400,063	28,298,480	1.166
Dressed				
meats . .	2,198,045	679,429,109	6,149,390	.905
Anthracite				
coal . . .	27,091,241	4,820,761,131	29,082,522	.603
Bituminous				
coal . . .	144,045,174	16,369,513,734	83,855,992	.512
Lumber . .	52,085,477	8,588,245,483	66,106,104	.770

That, in view of these facts, complainant charges at the average rate of 10 mills, or one cent, per ton established by the defendant, the Louisville & Nashville Railroad Company, on coal from points on its line in Western Kentucky, from which points the bulk of the coal transported by it comes to Nashville, which rate fixes the rate of \$1.00 per net ton to Nashville, and which rate the other defendant railways are forced to charge, is grossly excessive, undue and unreasonable as compared with the average rates per ton on other traffic and subject to the coal traffic at Nashville, the shippers and consumers of coal therein, the City of Nashville itself, and this complainant to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Act to Regulate Commerce.

\*Does not include returns for switching and terminal companies. Railway Statistics, 1909, the latest obtainable.

#### SECTION XIV.

That the Louisville & Nashville Terminal Company is a terminal corporation duly created and organized under the laws of the State of Kentucky, and was chartered under said laws on March 21, 1893.

That said company owns a union station, freight station and other terminal stations; that the length of the main track in Nashville, Tennessee, owned is 1.07 miles; that it also owns 30.32 miles of sidings; that its property is leased for (999) nine hundred and ninety-nine years (lease dated June 15, 1896) jointly by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway at a rental of (4) four per cent per annum, upon the cost; the proportion paid by each company being determined by its use of the property and the number of cars handled.

That the operating expenses are divided upon the same basis; that the capital stock authorized and outstanding on June 30, 1910, was one hundred thousand dollars, and all of it is now owned by the Louisville & Nashville Railroad Company, and of the par value of one hundred dollars per share.

That its funded debt outstanding June 30, 1910, consisted of two million five hundred and thirty-five thousand dollars, first mortgage 4 per cent fifty-year gold bonds, due June 1, 1952.

That these bonds are guaranteed by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway; that two million five hundred thousand dollars of them are outstanding in the hands of the public, and the remaining thirty-five thousand dollars are held in the treasury of the Louisville & Nashville Railroad Company, and its authorized issue is three million dollars.

That said company is engaged in connection with the defendants, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway, and the Tennessee Central Railroad Company, in the transportation, handling and switching of interstate traffic between points on its line and points on defendant's railway lines under through bills of lading.

#### SECTION XV.

That the defendant, the Louisville & Nashville Railroad Company, has in effect, at Nashville, Tennessee, and has filed

with this Honorable Commission, a terminal tariff, the same being G. F. O. No. 1751, I. C. C. No. A-12048, effective August 12, 1911, which contains rates, rules and regulations governing absorptions, bedding, drayage, feeding, switching and transfer charges on through business, State and interstate, and other terminal charges at stations on the Louisville & Nashville Railroad.

That on page 182 of said tariff the following provisions and rules appear:

"Switching charges between industries, warehouses and elevators situated on private sidings of the Louisville & Nashville Terminal Company, within terminal limits as enumerated on pages 185 to 188, inclusive, and junction with the Tennessee Central Railroad at Baxter Heights, Tenn., applicable as outlined below. Louisville & Nashville Railroad charges, \$3.00 per car."

Rule 1.—"The switching charge specified above is applicable only on freight traffic, car loads, except coal, to or from non-competitive points via the Tennessee Central Railroad when from or destined to industries, warehouses and elevators situated upon private sidings which connect with Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks, or tracks of the Louisville & Nashville Terminal Company, within terminal limits, Nashville, Tennessee."

Rule 2.—"By 'non-competitive' (in this particular instance) it is meant traffic for which the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway does not compete at equal rates with the Tennessee Central Railroad."

That said tariff designedly and intentionally excepts coal from off the Tennessee Central Railroad, whether coming from a competitive or non-competitive point from its provisions, thus preventing the switching or interchange of coal traffic, whether State or interstate, between industries, warehouses and elevators situated upon private sidings which connect with the Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks, or tracks of the Louisville & Nashville Terminal Company within terminal limits of Nashville, Tennessee, although such traffic is shipped from interstate points on through bills of lading.

That the defendant, the Nashville, Chattanooga & St. Louis Railway, has in effect at Nashville, Tenn., and has filed with this Honorable Commission a Terminal Tariff, the same being I. C. C. No. 1958-A, effective September 1, 1911, which contains "rates, rules and regulations governing demurrage, drayage, elevation, feeding, icing, switching, transfer and other terminal charges to and from all industries at points on the Nashville, Chattanooga & St. Louis Railway and Western & Atlantic Railroad; that on page 44 of said tariff the following provisions and rules appear:

"Switching charges between industries, warehouses and elevators within terminal limits, except as shown below, per hundred pounds, 1 cent. Minimum charge per car, \$3.00.

*Exception.*

"Between industries, warehouses and elevators situated in private sidings within the terminal limits and junction with the Tennessee Central Railroad at Shop Junction (Nashville, Chattanooga & St. Louis connection) applicable, as outlined below, switching charge, per car, \$3.00."

1. "The switching charge specified above is applicable only on freight traffic, carloads (except coal, cement and plaster), to or from non-competitive points via Tennessee Central Railroad when from or destined to industries, warehouses and elevators situated upon private siding, which connect with the Nashville, Chattanooga & St. Louis Railway tracks, or tracks of the Louisville & Nashville Terminal Company, within terminal limits, Nashville, Tennessee."

2. "By 'non-competitive' is meant traffic for which the Nashville, Chattanooga & St. Louis Railway or Louisville & Nashville Railroad does not compete at equal rates with the Tennessee Central Railroad."

That said tariff designedly and intentionally excepts coal from off the Tennessee Central Railroad, whether coming from a competitive or non-competitive point, from its provisions, thus preventing the switching or interchange of coal traffic, whether State or interstate, between industries, warehouses and elevators, situated upon private siding, which connects with the Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks, or tracks of the Louisville & Nashville Terminal Company, within the terminal limits of Nashville, Tennessee, although such traffic is shipped from interstate points on through bills of lading.

That the switching charges on all other traffic than coal coming from non-competitive points on the Tennessee Central Railroad, whether State or interstate, destined to industries, warehouses and elevators situated upon private sidings which connect with Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks or tracks of the Louisville & Nashville Terminal Company, within terminal limits of Nashville, Tennessee, is by said tariffs fixed at \$3.00 per car.

That the defendant, the Tennessee Central Railroad Company, has in effect at Nashville, Tennessee, and has filed with this Honorable Commission a switching tariff, the same being I. C. C. No. A-274, effective September 8, 1911, which contains "rates, rules and regulations governing drayage, switching and transfers," applying on traffic to or from all points on the Tennessee Central Railroad.

That on page 8 of said tariff the following rule appears:

Rule 8.—"Switching charge on traffic to or from non-competitive points."

"Switching charge between industries and warehouses on the tracks of the Tennessee Central Railroad Company enumerated herein and points of connection with the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway on traffic (except coal) to or from non-competitive points (see Rule 6) beyond Nashville, Tennessee," \$3.00 per car.

That said tariff designedly and intentionally excepts coal from off the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, whether coming from a competitive or non-competitive point from its provisions, thus preventing the switching or interchange of coal traffic, whether State or interstate, between industries, warehouses and elevators situated upon private siding which connects with the Tennessee Central Railroad tracks, within terminal limits of Nashville, Tennessee, although such traffic is shipped from interstate points on through bills of lading.

That by virtue of the provisions of the above tariffs, said defendants are giving undue and unreasonable preference and advantage to all classes of interstate traffic, except coal, at Nashville, Tennessee, and are subjecting the interstate traffic of coal at Nashville, Tennessee, to undue and unreasonable preju-



dice and disadvantage, in excepting said traffic from the privileges granted all other traffic at Nashville, Tennessee, in violation of Section 3 of the Act to Regulate Commerce.

### SECTION XVI.

That the defendants, the Louisville & Nashville Railroad Company, the Louisville & Nashville Terminal Company, the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad Company are and have been for several years engaged under the above or similar tariffs, in switching non-competitive interstate traffic, except coal, between the various points above set forth, at \$3.00 per car, which during said time they, and each of them, have purposely, designedly and intentionally declined to switch coal, whether State or interstate, whether coming from competitive or non-competitive points, when intended for any of the above-mentioned points, at \$3.00 per car, as charged by them on all other non-competitive traffic; the defendants, the Louisville & Nashville Railroad Company and the Tennessee Central Railroad Company, thus giving undue and unreasonable preference and advantage to all kinds of non-competitive interstate traffic, except coal; and the defendant, the Nashville, Chattanooga & St. Louis Railway, except coal, cement and plaster; all of the last named defendants thus subjecting the traffic of coal at Nashville, Tennessee, to undue and unreasonable prejudice and disadvantage in violation of the Act to Regulate Commerce, and its amendments, and particularly Section 3 thereof.

### SECTION XVII.

That the above-named tariffs and the discriminations created therein as above described were established and made by mutual agreement and concert of action, by, between and among the defendants, the Louisville & Nashville Railroad Company, the Louisville & Nashville Terminal Company, the Nashville, Chattanooga & St. Louis Railway, and the Tennessee Central Railroad Company; said agreements and the discriminations created therein, having been brought about by and between the Nashville, Chattanooga & St. Louis Railway, the Louisville & Nashville Terminal Company and the Louisville & Nashville Railroad Company, by virtue of and through the entire ownership of the capital stock of the Louisville & Nashville Terminal Company, and through the ownership of a majority of the capital stock of the defendant, the Nashville, Chattanooga & St. Louis Railway, as shown in Sections III, IX and XIV of this complaint, by the Louisville & Nashville Railroad Company.

That the traffic of coal was excepted by the Louisville & Nashville Railroad Company from the above named tariffs for the sole and exclusive purpose of maintaining its unjust and unreasonable rates of \$1.00 per ton from the mines on its Henderson Division and branches, and Owensboro and Nashville Division in Western Kentucky, as shown in Section III of this complaint, by the elimination in said tariffs of all movements or switching of coal, whether State or interstate, between industries, warehouses and elevators mentioned in said tariffs.

To illustrate: Shipments of coal for industries, warehouses and elevators situated upon private sidings which connect with the Louisville & Nashville Railroad Company's tracks, Nashville, Chattanooga & St. Louis Railway Company's tracks, or tracks of the Louisville & Nashville Terminal Company, within terminal limits of Nashville, Tennessee, are by said tariffs prohibited from being moved from points on the Tennessee Central Railroad Company to said points, and the reverse is equally true as to shipments of coal from points on the Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway, when destined to industries, warehouses and elevators situated upon private sidings, which connect with the Tennessee Central Railroad tracks within terminal limits of Nashville, Tennessee.

That 69 per cent of the warehouses, elevators, manufacturing industries and retail coal dealers in Nashville, Tennessee, are located either upon the sidings or tracks of the defendants, the Louisville & Nashville Railroad Company, the Louisville & Nashville Terminal Company, or the Nashville, Chattanooga & St. Louis Railway.

That the bulk of the coal shipped to Nashville, Tennessee, is shipped from points in Western Kentucky, located on the Louisville & Nashville Railroad Company, on its Henderson Division, and branches, and on its Owensboro & Nashville Division.

That a great part of the remainder of the coal shipped to Nashville, Tennessee, is shipped from points on the line of the defendant, the Nashville, Chattanooga & St. Louis Railway, and all of the coal shipped to Nashville, Tennessee, via either of the last named two defendants' lines, would, in every instance, under the above named tariffs, be denied or deprived of being switched to points situated on the Tennessee Central Railroad within terminal limits of Nashville, thus concentrating

and controlling the bulk of the coal traffic at Nashville, Tennessee, upon the lines of the defendants, the Louisville & Nashville Railroad Company, the Louisville & Nashville Terminal Company, and the Nashville, Chattanooga & St. Louis Railway, thus enabling the said three last named defendants by the above tariffs and others to be hereinafter referred to, to arbitrarily fix and maintain the rates on coal from all points to Nashville, Tennessee.

That to make said tariffs effective, and in furtherance of said tariffs the defendants separately issue tariffs and file with this Honorable Commission, wherein they charge the unjust and unreasonable rate of sixty cents per net ton on coal between the points mentioned in above described terminal tariffs.

As explanatory of said rate of 60 cents per net ton, and the tariffs publishing the same, complainant avers that the rates on coal to Nashville, Tennessee, via the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, and the Tennessee Central Railroad, from all points apply to all plant switches or other sidings within the terminal limits of Nashville, Tennessee, located on the line via which the coal arrives; in other words, coal arriving at Nashville, Tennessee, via the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway, will be delivered to the Tennessee Central Railroad at Vine Hill, Baxter Heights, or Shop Junction, at the published rate to Nashville, and the Tennessee Central Railroad charges a switching rate of 60 cents per net ton for switching such coal to plant switches or sidings within the terminal limits of Nashville, as published in T. C. R. R. I. C. C. No. A-142, effective July 20, 1909, and supplement No. 7 to I. C. C. No. A-142, effective January 24, 1911, which cancels supplement No. 6 to I. C. C. No. A-142, and contains all changes.

Coal arriving at Nashville, Tennessee, via the Tennessee Central Railroad will be delivered to the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway, or the Louisville & Nashville Terminal Company, at Vine Hill, Baxter Heights, or Shop Junction, at the published rate to Nashville, Tennessee, and these carriers charge a switching rate of 60 cents per net ton for delivery to plant switches or other sidings located on the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, or the Louisville & Nashville Terminal Company tracks or sidings within

the terminal limits of Nashville, Tennessee, as published in N., C. & St. L. Ry. I. C. C. No. 1724-A, effective July 5, 1909, supplement 13 to I. C. C. No. 1724-A, which cancels supplement 12 to I. C. C. No. 1724-A, effective June 12, 1911, and supplement No. 16 to I. C. C. No. 1724-A, which cancels supplement No. 15 to I. C. C. No. 1724-A. Supplements Nos. 13 and 16 contain all changes, and in L. & N. R. R. I. C. C. No. A-11500, effective June 1, 1910, supplement No. 9 to I. C. C. No. A-11500, which cancels supplement No. 7 to I. C. C. No. 11500, effective November 1, 1911, and supplement No. 10 to I. C. C. No. A-11500, which cancels supplement No. 8 to I. C. C. No. A-11500, effective November 30, 1911. Supplements 9 and 10 contain all changes; this line applying rates between Nashville, Tennessee, and Overtons, Tennessee, published on page 4, Section 1, as authorized by Rule 2, page 18, which reads as follows:

“To or from points not named herein, but which are directly intermediate with points to or from which specific class rates are named in this tariff, the class rate to or from the next more distant point will be applied.”

That said rate of 60 cents per net ton, or 3 cents per 100 pounds, as applied to coal, is excessive, unreasonable and unjust, and is in violation of the provisions of the Act to Regulate Commerce and its amendments, particularly Section 1 thereof.

It will therefore be seen that the effect of the terminal tariffs which prohibit the movement of coal as hereinbefore described, and the effect of the rate of 60 cents per net ton prescribed in the three last mentioned tariffs, all of which are Nashville Local Tariffs, prevent any switching between the competitive carriers for the coal traffic at Nashville, Tennessee, and such competition is denied Nashville by the concerted action of the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway Company, the Louisville & Nashville Terminal Company and the Tennessee Central Railroad Company, as hereinabove described.

## SECTION XVIII.

WHEREFORE, Complainant respectfully prays:

First. That complainant be allowed to file this complaint in its behalf, and on behalf of its members, and all other shippers

and consumers of coal in the City of Nashville and its vicinity, who may desire to come in and be made parties hereto.

Second: That the defendants hereto may be severally required to answer the charges herein.

Third: That after due hearing and investigation, an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violation of the said Act to Regulate Commerce, and its amendments; and to apply as maxima in the future for the transportation of coal in carloads from all of the above named shipping points in the States of Alabama, Kentucky and Tennessee, to said consuming or destination point, Nashville, in the State of Tennessee, such rates of transportation as this Honorable Commission may deem reasonable and just and fix for a reasonable and just rate for such transportation, a rate not to exceed 50 cents per net ton on coal carload from the points aforesaid to Nashville, Tennessee, and that in the future, for a period not exceeding two years, the said defendant carriers shall not charge or exact a greater rate on coal carload from the shipping points aforesaid to Nashville, Tennessee, than 50 cents per net ton.

Fourth: That the defendant carriers be required to refund to such of complainant's members and other shippers and consumers of coal in Nashville, Tennessee, who may come in by proper petition and make themselves parties to this proceeding, as reparation for the injuries sustained by them as a result of the unjust and unreasonable rates heretofore charged and collected for the transportation of shipments of coal as aforesaid as received by them at Nashville, Tennessee, such sums as this Honorable Commission may find on subsequent hearing and investigation to have been unjustly charged and collected in excess of the rates which this Honorable Commission may find to be reasonable and just rates for the services heretofore performed by the defendant carriers for such parties in the transportation of coal from the shipping points aforesaid to Nashville, Tennessee.

Fifth: That the tariff of the defendant, the L. & N. R. R. Co. G. F. O. No. 1751, I. C. C. No. A-12048, containing rates, rules and regulations governing absorptions, bedding, drayage, feeding and switching and transfer charges on through business, and other terminal charges at stations on the Louisville & Nashville Railroad, and that the tariff of the defendant, the Nashville, Chattanooga & St. Louis Railway, Terminal Tariff I. C.

C. No. 1958-A, containing rates, rules and regulations governing demurrage, drayage, elevation, feeding, icing, switching, transfer and other terminal charges to and from industries and points on its line and the Western & Atlantic Railroad, and that the tariff of the defendant, the Tennessee Central Railroad I. C. C. No. A-274, containing rates, rules and regulations governing drayage, switching and transfer, applying on traffic to or from all points on the Tennessee Central Railroad, be declared illegal and void, as giving undue and unreasonable preference and advantage to all classes of interstate traffic, except coal, at Nashville, Tennessee, and as subjecting the interstate traffic of coal at Nashville, Tennessee, to undue and unreasonable prejudice and disadvantage in excepting said traffic from the privileges granted all other traffic as being in violation of Section 3 of the Act to Regulate Commerce.

Sixth: That the tariffs of the defendants, the Tennessee Central Railroad Company I. C. C. No. A-142, and supplement No. 7 to I. C. C. No. A-142, and the Nashville, Chattanooga & St. Louis Railway, I. C. C. No. 1724-A, and supplements Nos. 13 and 16 to I. C. C. No. 1724-A, and the Louisville & Nashville Railroad Company I. C. C. No. A-11500, and supplements Nos. 9 and 10 to I. C. C. No. A-11500, be declared illegal and void as being in violation of Section 1 of the Act to Regulate Commerce, in charging the rate of 60 cents per net ton, or 3 cents per 100 pounds, for switching charges on coal; said charge of 60 cents per net ton, or 3 cents per 100 pounds, being excessive, unreasonable and unjust.

Seventh: That this Honorable Commission will grant such other relief and enter herein such other and further order or orders as the facts and circumstances of this case may require, and as may be in conformity to law.

PERKINS BAXTER,  
*Attorney for Complainant.*

CHARLES S. MARTIN,  
*President Traffic Bureau of Nashville.*

L. B. JOHNSON,  
*Commissioner Traffic Bureau of Nashville.*

STATE OF TENNESSEE,  
COUNTY OF DAVIDSON.

Charles S. Martin makes oath that he is the President of the Traffic Bureau of Nashville, a corporation; that he has read the above complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and that as to those matters he believes it to be true, and he hereto affixes the seal of said company in further attestation of the truth of its answer.

CHAS. S. MARTIN.

Sworn to and subscribed before me, this, the 30th day of December, 1911.

(SEAL)

T. M. HENDERSON, *Notary Public*.

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“EXHIBIT B.”

Before the

INTERSTATE COMMERCE COMMISSION.

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THE TRAFFIC BUREAU OF NASHVILLE, TENNESSEE, *Complainant*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
*Et Al., Defendants.*

I. C. C. Docket No. 4604.

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Separate answer of the Louisville & Nashville Railroad Company.

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I.

Respondent has no knowledge or information concerning the allegations set forth in Section 1 of the petition.

## II.

Respondent is a common carrier engaged in interstate commerce, including the transportation of bituminous coal to Nashville, Tennessee, and as such, is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplementary thereto.

## III.

Respondent admits that it is a railroad corporation duly created and organized under the laws of the State of Kentucky, and that it controls the Nashville, Chattanooga & St. Louis Railway through ownership of \$7,177,600 of \$10,000,000 outstanding capital stock.

Respondent admits that it has in effect and has filed with this Honorable Commission tariffs whereby it charges and collects for the transportation of coal from various points in the State of Kentucky to Nashville, Tennessee, the rate of \$1.00 per net ton.

Respondent says that there are numerous errors in the distances set forth in Section III at the top of page 3 of the complaint, and that the correct distances from mines on its Henderson Division and Morganfield Branch to Nashville are as follows:

From—	Miles.	From—	Miles.
Arnold, Ky. ....	142	Nebo, Ky. ....	118
Barnsley, Ky. ....	102	New Empire, Ky. ....	97
Clay, Ky. ....	132	Nortonville, Ky. ....	97
Earlington, Ky. ....	104	Providence, Ky. ....	125
Empire, Ky. ....	89	Pride, Ky. ....	140
Hamner, Ky. ....	147	Robards, Ky. ....	134
Madisonville, Ky. ...	108	Sebree, Ky. ....	129
Manning, Ky. ....	95	Shrote, Ky. ....	145
Mortons, Ky. ....	100	South Diamond, Ky..	100
Morganfield, Ky. ....	151	Williams, Ky. ....	137

Respondent says that the average distance haul of coal to Nashville from the above named points is 119.6 miles, and not 122.5 miles as alleged.

Respondent denies that the bulk of the coal shipped from the above named points to Nashville is shipped from Earlington, Empire, Madisonville and Nortonville.



Respondent says that there is no mine in operation at this time at Empire, Kentucky.

Respondent says that there are numerous errors in the distances set forth in Section III at the foot of page 3 and also that the list of mines is erroneous, and that the following is a correct list of its Owensboro & Nashville Division mines, and the distances therefrom to Nashville, figured via Guthrie, Kentucky:

From—	Miles.	From—	Miles.
Beech Creek, Ky. ....	98	Island, Ky. ....	118
Beech Creek Jct., Ky. .	96	South Carrolton, Ky..	110
Bevier, Ky. ....	103	Blades, Ky. ....	118
Browder, Ky. ....	98	Halsted, Ky. ....	119
Central City, Ky. ....	107	Holt Mines, Ky. ....	104
Cleaton, Ky. ....	104	Karnes, Ky. ....	118
Drakesboro, Ky. ....	100	Lodona, Ky. ....	98
Elk Valley, Ky. ....	101	Mooreton, Ky. ....	110

Respondent says that the average distance haul to Nashville from the above named points is 106.4 miles and not 105 miles, as alleged.

Respondent denies that the bulk of the coal that comes to Nashville is shipped from Bevier and Mud River, and says that the mines at Mud River were long since abandoned.

Respondent denies that each of the above named rates is excessive, unreasonable or unjust, or in violation of the provisions of the Act to Regulate Commerce, or that reasonable or just rates for such transportation from said shipping points to Nashville should not exceed 50 cents per net ton.

#### IV.

Respondent has no knowledge or information as to whether the manufacturers or consumers of steam coal at Nashville, Tennessee, compete in the sale of their manufactured products with Chattanooga, Knoxville or Memphis, Tennessee; Louisville or Covington, Kentucky; Cincinnati, Ohio; East St. Louis, Illinois, and Birmingham, Alabama.

Respondent denies that all of said cities have a much lower rate on steam coal especially, or also a lower rate on all other

kinds of coal than is accorded Nashville by defendant Louisville & Nashville Railroad Company.

Respondent denies that it, for rate-making purposes, divides the coal-producing or shipping points upon its line in Kentucky into Eastern and Western mines; or that the points in Kentucky on its line which carry the rate of \$1.00 per ton to Nashville as shown in Section III of the complaint are what are known as its Western Kentucky mines, although they are located in that portion of the State.

Respondent admits that by tariffs duly published and filed with this Honorable Commission it charges and collects for the transportation from its Henderson Division and Morganfield Branch mines to Louisville, Kentucky, on the same kind of coal, a rate of 60 cents per ton, but says that the average haul to Louisville is 159 miles and not 234 miles, and that the average rate per ton per mile is 3.77 mills and not 2.6 mills.

Respondent also admits that by tariffs duly published and filed with this Honorable Commission it charges from its Owensboro and Nashville Division mines to Louisville, on the same kind of coal, a rate of 60 cents per ton, but says that the average haul to Louisville is 128.4 miles and not 177.5 miles, and that the average rate per ton per mile is 4.67 mills and not 3.4 mills.

Respondent admits that it publishes a rate to Memphis from its Henderson Division and Morganfield Branch mines to Memphis of \$1.10 per net ton on the same kind of coal; but says that the average distance haul is 282.5 miles and not 286 miles, and that the average rate per ton per mile is 3.9 mills and not 3.8 mills.

Respondent admits that it publishes a rate from its Owensboro & Nashville Division mines to Memphis of \$1.10 per net ton on the same kind of coal, but says that the average distance haul is 270.4 miles and not 271.5 miles, and that the average rate per ton per mile is 4.1 mills and not 4 mills.

Respondent denies that the rate of \$1.10 per net ton to Memphis is an advanced rate, and says that while a rate of \$1.00 per ton was in effect prior to the establishment of the \$1.10 rate, the latter is considerably lower than rates which have been in effect to Memphis from time to time in the past and is but a partial restoration of rates formerly in effect.

Respondent admits that said rate of \$1.10 is now in question before this Honorable Commission as to its reasonableness by the Memphis Freight Bureau, in Case No. 3997 on the Commission's Docket.

Respondent admits that it publishes a rate to East St. Louis from its Henderson Division and Morganfield Branch mines of \$1.00 per ton on the same kind of coal, but says that the average distance haul is 221 miles and not 228 miles, and that the average rate per ton per mile is 4.52 mills and not 4.4 mills.

Respondent admits that it publishes a rate from its Owensboro & Nashville Division mines to East St. Louis of \$1.10 per ton, but says that the average distance haul is 238.4 miles and not 327.5 miles, and that the average rate per ton per mile is 4.61 mills and not 3.4 mills.

Respondent admits that it has published rates on coal from its mines in Southeastern Kentucky, East Tennessee and Southwest Virginia to Louisville and Covington, Kentucky, and Cincinnati, Ohio, as set forth in the petition, but respondent denies that the average distance hauls and average rates per ton per mile are as set forth therein.

The correct average distances and average rates per ton per mile are as follows:

From—	Distance.	Rate Per Ton Per Mile.
To Cincinnati, Ohio.		
Group 1.....	276 miles	3.6 mills
Group 2.....	230 miles	4.1 mills
Group 3.....	220 miles	4.1 mills
Group 4.....	167 miles	4.8 mills
To Covington, Ky.		
Group 1.....	274 miles	3.3 mills
Group 2.....	228 miles	3.7 mills
Group 3.....	218 miles	3.7 mills
Group 4.....	165 miles	4.2 mills
To Louisville, Ky., from		
Group 1.....	261 miles	Group 1 Note A 3.3 mills
Group 2.....	215 miles	Group 1 Note B 3.6 mills
Group 3.....	205 miles	Group 1 Note C 4.0 mills
Group 4.....	153 miles	

Group 2 Note A 3.5 mills  
Group 2 Note B 3.9 mills  
Group 2 Note C 4.4 mills

Group 3 Note A 3.7 mills  
Group 3 Note B 4.1 mills  
Group 3 Note C 4.6 mills

Group 4 Note A 4.2 mills  
Group 4 Note B 4.9 mills  
Group 4 Note C 5.6 mills

Respondent admits that it publishes rates on coal from its Southeastern Kentucky and East Tennessee Mines to Knoxville, Tennessee, as set forth in the petition; but denies that the average distance hauls and the average rates per ton per mile are as set forth therein.

The correct distances and rates per ton per mile are as follows:

Distance from Group 1.....	38 miles
Group 2.....	62 miles
Group 3.....	113 miles
Group 4.....	124 miles

Average rate per ton per mile on slack, pea and steam nut, and 3-inch steam coal:

From Group 1.....	10.5 mills
Group 2.....	7.3 mills
Group 3.....	4.4 mills
Group 4.....	4.8 mills

On all other kinds of coal:

From Group 1.....	15.7 mills
Group 2.....	10.5 mills
Group 3.....	6.2 mills
Group 4.....	6.5 mills

Respondent admits that it publishes rates on coal from its Southeastern Kentucky and East Tennessee mines to Chattanooga, Tennessee, in connection with the Western & Atlantic Railroad via Cartersville, Georgia, as set forth in the petition, but denies that the average distance hauls and the average rates per ton per mile are as set forth therein.

The correct distances and average rates per ton per mile are as follows:

Distance from Group 1.....	273 miles
Group 2.....	295 miles
Group 3.....	347 miles
Group 4.....	359 miles

Average rate per ton per mile:

From Group 1.....	4.2 mills
Group 2.....	3.9 mills
Group 3.....	3.3 mills
Group 4.....	3.5 mills

Respondent admits that it does not publish rates on coal from its mines in Kentucky, Tennessee or Virginia to Birmingham, Alabama.

V.

Respondent denies each and every allegation contained in Section V of the petition.

VI.

Respondent denies each and every allegation contained in Section VI of the petition.

VII.

Respondent denies each and every allegation contained in Section VII of the petition.

VIII.

Respondent denies each and every allegation contained in Section VIII of the petition.

IX.

For response to all of the allegations contained in Section IX of the petition, except those with respect to this respondent's ownership of \$7,177,600 of the capital stock of the Nashville, Chattanooga & St. Louis Railway, and about which respondent has previously answered herein, respondent prays leave to adopt and make reference to the separate answer of said Nashville, Chattanooga & St. Louis Railway to said petition.

X.

For response to all of the allegations contained in Section X of the petition, respondent prays leave to adopt and make reference to the separate answer of said Nashville, Chattanooga & St. Louis Railway to said section.

XI.

For response to all of the allegations contained in Section XI of the petition, respondent prays leave to adopt and make reference to the separate answer of said Nashville, Chattanooga & St. Louis Railway to said section.

XII.

Respondent says that the allegations contained in Section XII of the petition do not relate to or require answers from this respondent.

XIII.

Respondent denies each and every allegation contained in Section XIII of the petition purporting to show that its existing rates for the transportation of coal from its Henderson Division, Morganfield Branch, and Owensboro & Nashville Division mines to Nashville, Tennessee, are unjust or unreasonable *per se* or relatively.

XIV.

Respondent denies each and every allegation contained in Section XIV of the petition and says that the Louisville & Nashville Terminal Company was incorporated under the general laws of Tennessee by the filing of articles of incorporation in the office of the Register of Davidson County, March 21, 1893, and in the office of the Secretary of State of Tennessee, March 22, 1893; that by lease of date, April 27, 1896, the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway leased to the Louisville & Nashville Terminal Company for a term of nine hundred and ninety-nine years from May 1, 1896, various parcels of land in the City of Nashville, Tennessee; that thereafter, by lease of date June 15, 1896, the Louisville & Nashville Terminal Company leased to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, for the term of nine hundred and ninety-nine years from July 1, 1896, various parcels of land in the City of Nashville, Tennessee,

specifically described, including the parcels of land described in the leases of April 27, 1896, from the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to the Louisville & Nashville Terminal Company, together with passenger and freight depot buildings and other facilities then located or thereafter to be constructed on the premises described; that as rent for the premises and improvements described, the lessees agreed to pay a sum equal to interest at four per cent per annum upon the actual cost of all expenditures theretofore made, or to be thereafter made, by said first party, its successors and assigns, from time to time, in the purchase or other acquisition of said premises or property, and in the erection and construction of said improvements, and of all additions thereto and extensions thereof, and to all taxes, rates, charges and assessments that might be levied or imposed during the term or terms aforesaid, upon said premises or property, and said improvements, and all additions thereto, and extensions thereof, and to the cost of such insurance as might be necessary to keep said premises, or property, and said improvements and all additions thereto, and extensions thereof, insured to their full value during the term or terms aforesaid; that by a contract between the same parties, of date August 15, 1900, the total amount upon which the rent was to be estimated and the method of apportioning the rent between the parties were agreed upon, and by a contract of same date between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, provision was made for the maintenance and operation of the leased property, which it was agreed should be known as "Nashville Terminals"; that by contract of date December 2, 1902, between the Louisville & Nashville Terminal Company and the Louisville & Nashville Railroad Company, the lease of April 27, 1896, from the Louisville & Nashville Railroad Company to the Louisville & Nashville Terminal Company was cancelled and by a like contract of same date between the Louisville & Nashville Terminal Company and the Nashville, Chattanooga & St. Louis Railway the lease of April 27, 1896, from the latter to the former company was cancelled; that by contract of date December 3, 1902, between the Louisville & Nashville Terminal Company, the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, various provisions of the lease of June 15, 1896, were cancelled and abrogated and other provisions were modified, the term reduced from nine hundred and ninety-nine years to ninety-nine years from July 1, 1896, and the parcels of land embraced in the lease

of April 27, 1896, from the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company to the Terminal Company, and which leases were cancelled by the contracts of December 2, 1902, were excluded; and that in lieu of the rent provided for by the original lease of June 15, 1896, the lessees agreed to pay as rent the principal and interest of the bonds secured by the fifty-year 4 per cent gold first mortgage for \$3,000,000 executed by the Louisville & Nashville Terminal Company to the Manhattan Trust Company of New York, as trustee, on December 1, 1902, and the lessees further agreed to pay all "taxes, rates, charges and assessments" that might be levied or imposed during the term, and to keep the improvements in repair and fully insured. Respondent says that of the bonds authorized by the mortgage referred to, only \$2,535,000 have been issued, and all are owned by the Louisville & Nashville Railroad Company.

Respondent further says that the Louisville & Nashville Terminal Company is not engaged in either interstate or intrastate transportation, all of its property, stations, tracks and facilities being leased to and jointly operated by the respondents Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway under the name or designation of "Nashville Terminals."

## XV.

Respondent admits that it has in effect at Nashville, Tennessee, and has filed with this Honorable Commission, a terminal tariff, the same being G. F. O. No. 1751, I. C. C. No. A-12048, effective August 12, 1911, which contains rates, rules and regulations governing absorptions, bedding, drayage, feeding, switching and transfer charges on through business, State and interstate, and other terminal charges at stations on the Louisville & Nashville Railroad.

Respondent admits that on page 182 of said tariff the following provisions and rules appear:

"Switching charges between industries, warehouses and elevators situated on private sidings of the Louisville & Nashville Terminal Company, within terminal limits as enumerated on pages 185 to 188, inclusive, and junction with the Tennessee Central Railroad at Baxter Heights, Tenn., applicable as outlined below, Louisville & Nashville Railroad charge, \$3.00 per car."



Rule 1.—“The switching charge specified above is applicable only on freight traffic, carloads, except coal, to or from non-competitive points via the Tennessee Central Railroad, when from or destined to industries, warehouses and elevators situated upon private sidings which connect with Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks, or tracks of the Louisville & Nashville Terminal Company, within terminal limits, Nashville, Tennessee.”

Rule 2.—“By ‘non-competitive’ (in this particular instance), it is meant traffic for which the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway does not compete at equal rates with the Tennessee Central Railroad.”

Respondent says, however, that the references therein to the private sidings and tracks of the Louisville & Nashville Terminal Company are in error, and that, as previously stated, all of the properties, stations, tracks and facilities of the Louisville & Nashville Terminal Company are leased to and jointly operated by respondents Louisville & Nashville Railroad and Nashville, Chattanooga & St. Louis Railway, under the name or designation of “Nashville Terminals.”

Respondent admits that said tariff designedly and intentionally excepts coal from off the Tennessee Central Railroad, and respondent has never switched any such coal to locations upon its rails, because such coal is competitive with the coal originating on respondent’s railroad.

Respondent specifically denies that coal from off the Tennessee Central Railroad moves, or ever has moved, on through bills of lading, to any industries, warehouses or elevators situated upon private sidings which connect with the Louisville & Nashville Railroad tracks, Nashville, Chattanooga & St. Louis Railway tracks or tracks of the Louisville & Nashville Terminal Company within terminal limits of Nashville, Tennessee; and says that no through rates and joint routes are now or ever have been in effect on coal from any points on or via the Tennessee Central Railroad to Nashville, Tennessee, in connection with companies mentioned.

With respect to the allegations concerning the terminal tariffs of the Nashville, Chattanooga & St. Louis Railway and Tennessee Central Railroad Company, respondent prays leave

to adopt and make reference to the separate answers of the Nashville, Chattanooga & St. Louis Railway and Tennessee Central Railroad Company with respect thereto.

Respondent denies that by virtue of the provisions of the above tariffs defendants are giving undue and unreasonable preference and advantage to all or any classes of interstate traffic except coal at Nashville, Tennessee, or are subjecting the interstate traffic of coal at Nashville, Tennessee, to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act to Regulate Commerce or any other section thereof.

XVI.

Respondent denies each and every allegation contained in Section XVI of the petition.

XVII.

Respondent denies each and every allegation contained in Section XVII of the petition.

XVIII.

Respondent denies each and every allegation contained in Section XVIII of the petition,

And, having fully answered, respondent prays to be hence dismissed.

*Solicitor for Respondent.*

“EXHIBIT C.”

Before the  
INTERSTATE COMMERCE COMMISSION.

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Docket No. 4604.

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THE TRAFFIC BUREAU OF NASHVILLE, TENNESSEE

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY Et Al.

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The separate answer of the Nashville, Chattanooga & St. Louis Railway to the petition filed in the above entitled proceeding.

For answer to said petition respondent says as follows:

1. Respondent admits the existence of the organization known as the Traffic Bureau of Nashville, Tennessee, referred to in paragraph one of the petition, but is without information as to the terms of its charter, or as to who are interested in the present complaint.

2. Respondent, so far as it is concerned, admits the correctness of the allegations contained in paragraph two of the petition.

3. Respondent assumes that the allegations contained in paragraphs three, four, five, six, seven and eight of the petition, which have particular reference to its co-defendant, the Louisville & Nashville Railroad Company, will be answered by that company, and accordingly respondent neither admits nor denies the correctness of said allegations, or any of them.

9. Respondent admits the correctness of the allegations contained in the first six sections of paragraph nine of the petition, but denies that it maintains a rate on coal from Carlisle, Alabama, to Nashville, Tennessee, or that there is any movement of coal between the said points, and likewise denies that any of the rates named in said paragraph are unreasonable or otherwise in violation of any of the provisions of the Act to Regulate Commerce, or that they should not exceed 50 cents per net ton.

10. Respondent admits the correctness of the allegations contained in the first two sections of paragraph ten of the petition, and also that the average distance to Chattanooga, Tennessee, from the points mentioned in said paragraph is 87 miles, but denies that the average rate per ton per mile is 8.7 mills, and also denies the correctness of the allegations contained in the last section of said paragraph.

11. Respondent denies the correctness of all and singular the allegations contained in paragraph eleven of the petition.

12. Respondent assumes that the allegations contained in paragraph 12 of the petition, which have particular reference to its co-defendants, the Illinois Central Railroad Company and the Tennessee Central Railroad Company, will be answered by those companies; and accordingly respondent neither admits nor denies the correctness of said allegations, or any of them.

13. Respondent, while it admits that coal is a low class traffic, as alleged in paragraph thirteen of the petition, is without information enabling it either to admit or deny the correctness of the other allegations contained in said paragraph, except that it denies that the rates, or any of them, mentioned therein are unreasonably or unduly discriminatory or otherwise in violation of any of the provisions of the Act to Regulate Commerce.

14. Respondent admits the existence of the corporation known as the Louisville & Nashville Terminal Company, which, however, was created and organized under the laws of the State of Tennessee, and not under the laws of the State of Kentucky, as alleged in paragraph fourteen of the petition, and it also admits the substantial correctness of the other allegations con-

tained in said paragraph, except that it denies the correctness of the allegations contained in the last section thereof, to the effect that said company is engaged in the operations therein attributed to it. It avers that the said company is not an operating company, and that any tariff which seems to give color to a contrary view is the result of inadvertent publication and altogether misleading.

15. Respondent admits its responsibility for the Terminal Tariff I. C. C. No. 1958-A referred to in paragraph fifteen of the petition, and asks that reference be made thereto for the purpose of ascertaining the contents thereof. It denies the correctness of all and singular the allegations contained in said paragraph to the effect that coal is not competitive traffic or that the application of said tariff thereto results in giving undue preference and advantage to other classes of traffic at Nashville, Tennessee, or in any manner whatever violates any of the provisions of the Act to Regulate Commerce.

16. Respondent admits the correctness of the allegations contained in paragraph sixteen of the petition in so far, and only in so far, as they detail what is, and what has been, done in accordance with respondent's lawfully published tariffs, but denies that any of the matters and things therein alleged constitute or produce undue discrimination or otherwise violate any of the provisions of the Act to Regulate Commerce.

17. Respondent is without information enabling it either to admit or deny the accuracy of all the allegations contained in paragraph seventeen of the petition, but denies the charge of mutual agreement and concert of action with its co-defendants the Louisville & Nashville Railroad Company and Tennessee Central Railroad Company therein contained, and all and singular the allegations thereof to the effect that it prohibits any movement of coal at Nashville, or that any of the rates and charges named in said paragraph are unreasonable or unduly discriminatory or otherwise in violation of any of the provisions of the Act to Regulate Commerce.

Respondent denies each and all of the allegations of the petition not hereinbefore answered, which assert that any of its rates, charges and practices are contrary to any of the provisions of the Act to Regulate Commerce, and therefore it denies that any of the prayers of the petition should be granted or that it should be subjected to any adverse order whatever.

And having fully answered, respondent prays to be hence dismissed, etc.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

By \_\_\_\_\_, *General Counsel.*

The foregoing petition and Exhibits A, B, C and E filed under one cover and endorsed:

Filed February 5, 1914, 4 p.m.

H. M. DOAK, *Clerk.*

On February 9, 1914, the following answer of respondent United States of America was filed, to-wit:

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IN THE UNITED STATES DISTRICT COURT, MID-  
DLE DISTRICT OF TENNESSEE, NASH-  
VILLE DIVISION.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
*Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent.*

---

In Equity. No. 21.

---

ANSWER OF THE RESPONDENT.

Comes now the respondent United States of America, by its counsel, and for answer to the petition filed herein against it, says:

I. It admits the allegations of Paragraph I.

II. It admits the complaint was filed as alleged in Paragraph II. It has no knowledge that Exhibit "A" is a true copy of said complaint, and neither admits nor denies the same. If it becomes material on the hearing, respondent will require strict proof thereof.

III. It admits the answers were filed as alleged in Paragraph III. It has no knowledge that Exhibit "B" and Exhibit "C" are true copies of said answers, and neither admits nor denies the same. If it becomes material on the hearing, respondent will require strict proof thereof.

IV. It admits the number and title of the proceeding before the Interstate Commerce Commission and the hearings therein. It admits the great size and volume of the record of the evidence and proceedings before the Commission. It has no knowledge that the proposed transcript referred to as Exhibit "D" embraces all of the evidence which was introduced before the Commission in the proceeding and hearings, or that the same is a true and correct transcript, and neither admits nor denies the same. If it becomes material on the hearing, respondent will require strict proof thereof.

V. It denies the allegations of Paragraph V, and each and every part of the same.

VI. It admits the Interstate Commerce Commission made a report in writing and entered its orders thereon. It assumes the copies of said report and orders attached to the petition as Exhibit "E" are substantially correct, but for accuracy respondent will offer upon the hearing a copy of said report and order duly certified according to law, and prays that the same may be read and considered as a part hereof as fully and completely as if incorporated herein.

It denies that the findings of fact made by the Interstate Commerce Commission in its said report and orders were made regardless of, and in direct conflict with, the uncontroverted facts established in said proceeding, or that any conclusions of the Commission are unwarranted.

VII. It denies (with the exception of the allegation of the existence of the statute under which it is sought to main-

tain this suit) the allegations of Paragraph VII, and each and every part of the same.

VIII. It denies the allegations of Paragraph VIII, and each and every part of the same.

IX. It denies the allegations of Paragraph IX, and each and every part of the same.

Respondent denies each and every other allegation in the said petition contained not herein specifically admitted or denied.

Further answering the said petition, respondent alleges that the matters and things alleged therein and sought to be put in issue were all before the Interstate Commerce Commission, and were fully heard and determined by it. They were within its power and authority to hear and determine under the provisions of the Act to Regulate Commerce. In its report in writing with respect thereto, made after a full hearing and investigation and after due notice to all of the parties, which states its conclusions, together with its decision, orders, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact, based on substantial evidence.

Respondent now gives notice that on the final hearing hereof, or on any preliminary hearing hereof, and in accordance with Section 1 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910, it will move to dismiss the petition, for that the same is insufficient to state any cause of action against the respondent.

Wherefore, having fully answered, respondent prays that the petition be dismissed at the cost of the petitioners, and for such other and further orders as may be appropriate in the premises.

A. M. TILLMAN,  
*United States Attorney for the Middle  
District of Tennessee.*

BLACKBURN ESTERLINE,  
*Special Assistant to the Attorney-General.*



Above answer of respondent United States of America endorsed:

Filed Feby. 9, 1914.

H. M. DOAK, *Clerk.*

On February 10, 1914, the following answer of the Interstate Commerce Commission was filed, to-wit:

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No. 21. Equity.

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY, *Petitioners.*  
vs.

THE UNITED STATES OF AMERICA, *Respondent.*  
INTERSTATE COMMERCE COMMISSION, *Respondent.*

---

ANSWER OF THE INTERSTATE COMMERCE  
COMMISSION.

The Interstate Commerce Commission, having entered its appearance as respondent in the above-entitled cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I.

This respondent admits, that the petitioners are corporations organized and existing as respectively set forth in Paragraph I of said petition; that they respectively operate the lines of railroad therein described, and that they are engaged in interstate commerce.

II.

Answering Paragraph II of the petition, this respondent admits that the Traffic Bureau of Nashville, Tenn., filed with this respondent a complaint, copy of which is marked "Exhibit A" to the petition, and is referred to in the report of this respondent hereinafter referred to.

III.

This respondent admits the filing of the answers by said petitioners as set forth in Paragraph III of the petition.

IV.

Answering Paragraph IV of the petition, this respondent alleges that it instituted an investigation and accorded to all of the parties in said proceeding and cause, known as No. 4604, Traffic Bureau of Nashville, Tenn., vs. Louisville & Nashville Railroad Company, et al., a full hearing, as required by the Act to Regulate Commerce as amended; that hearings were had at Nashville, Tenn., Louisville, Ky., and Washington, D. C., at which hearings the said petitioners appeared and submitted evidence upon all the matters and things in controversy in said cause, including the matters and things set forth in the petition herein; that said petitioners were fully heard touching all the matters involved in said investigation and hearing by this respondent, and thereafter, on December 9, 1913, after full consideration thereof, this respondent filed its report in writing in respect thereto, stating its conclusions thereon together with its decision, order, and requirement in the premises; that said report, conclusions, and order by this respondent are, and each of them is, supported by substantial evidence appearing in the record of said proceeding and cause before this respondent.

Respondent denies the right of the petitioners to have this case heard upon application for an interlocutory injunction or upon final hearing on the ground that said report and order

by this respondent was not supported by substantial evidence without the production before the court of a certified copy of the evidence in said proceeding and cause before this respondent.

V.

Answering Paragraphs V and VI of said petition, this respondent presents its report and order, a copy of which is hereto attached, marked "Exhibit A," and which is hereby made a part of this answer.

VI.

Answering Paragraph VII of said petition, this respondent presents its said report and order and alleges that the same is supported by substantial evidence, as will appear by reference to the record thereof when, and if, presented to the court.

This respondent admits that the allegations of the petitioners' rates upon coal as required by said order will reduce the net revenues per ton of the carriers, but whether such reductions will materially reduce the gross revenues from their coal traffic this respondent is not advised, but alleges that the same cannot be determined except by experience under the operation of the rates required. This respondent denies that the enforcement of said order will result in taking the property of petitioners, or of either of them, in contravention of the Fifth Amendment to the Constitution of the United States, and this respondent avers that there are no facts set forth in said petition upon which the court may or can draw any such conclusion.

VII.

Answering Paragraph VIII of said petition, this respondent denies that it acted in a capricious or unreasonable manner, or that it exceeded its authority under the Act to Regulate Commerce aforesaid, or that it erred in any matter of law in the conduct of said proceedings, or in its conclusions or order therein.

VIII.

This respondent denies that the petitioners, or either of them, will suffer any irreparable loss on account of the enforcement of said orders not necessarily incurred by the reduction of the unreasonable rates and practices and the substitution thereof of the reasonable rates and practices referred to and specified in this respondent's report aforesaid.

IX.

Further answering, this respondent says that it is advised that respondent had full jurisdiction of the matters in controversy before it; that its jurisdiction as to said matters is primary and exclusive, and that its said conclusions of fact in said matters in controversy are final and conclusive upon the petitioners, and each of them, and that the petitioners are in duty bound to obey said order.

All of which matters and things this respondent is ready to aver, maintain, and prove as this Honorable Court shall direct, and prays the same advantage as to each and all of the matters and things aforesaid as this respondent would be entitled to if the same were specially pleaded, or set forth by way of demurrer, or motion to dismiss the petition.

And having fully answered said petition, this respondent prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,  
By CHARLES W. NEEDHAM, *its Solicitor*.

CITY OF WASHINGTON }  
DISTRICT OF COLUMBIA } ss

Charles C. McChord, being duly sworn, deposes and says, that he is a member of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to the matters within the knowledge of the Commission, and as to other matters stated therein he believes it to be true.

CHARLES C. MCCORD.

Subscribed and sworn to before me, George B. McGinty, a notary public within and for the District of Columbia, this 7th day of February, 1914.

GEORGE B. MCGINTY, *Notary Public*.

(SEAL)

The above answer of the Interstate Commerce Commission endorsed:

Filed Feby. 10, 1914.

H. M. DOAK, *Clerk*.

EXHIBIT A.

INTERSTATE COMMERCE COMMISSION.

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No. 4604.

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TRAFFIC BUREAU OF NASHVILLE, TENN.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
ET AL.,

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*Submitted January 5, 1913.*

*Decided December 9, 1913.*

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1. Conditions affecting the transportation of coal from Louisville & Nashville Railroad Western Kentucky mines to Louisville, Ky., Memphis and Nashville, Tenn., not found to be so dissimilar as to preclude a comparison of the rates from the same fields to the three cities.

2. Rate of \$1.00 per ton on coal to Nashville from Louisville & Nashville Western Kentucky mines found to be unreasonable, and rate of 80 cents prescribed. A like rate from Nashville, Chattanooga & St. Louis Railway mines in Tennessee and Alabama found to be unreasonable, and rate of 90 cents prescribed.

3. Complaint as to reasonableness of \$1 rate to Nashville on coal from Illinois Central Western Kentucky mines not sustained.

4. The value of ton, car, and train mileage statistics in fixing rates discussed.

5. The Louisville & Nashville and the Nashville, Chattanooga & St. Louis interswitch all traffic, including coal, at Nashville. They refuse to switch coal to and from the Ten-

nessee Central, which road retaliates by refusing to switch coal to or from the rails of either of the other two. Upon complaint; *Held*, That the practice of all three roads is unreasonable, and further, that of the Louisville & Nashville and Nashville, Chattanooga & St. Louis is unjustly discriminatory. Discrimination required to be removed and reasonable practice prescribed.

6. "Terminals are either open or they are not," and a carrier may not exercise an arbitrary discretion, based upon a strained construction of the proviso of Section 3, in saying for what roads and for what traffic it will open its terminals and for what other roads and traffic it will decline so to do.

*Perkins Baxter* and *K. T. McConnico* for complainant and interveners.

*William A. Northcutt* for Louisville & Nashville Railroad Company.

*R. Walton Moore* for Nashville, Chattanooga & St. Louis Railway and Illinois Central Railroad Company.

*C. C. Waller* for Nashville, Chattanooga & St. Louis Railway.

*Fordyce, Holliday & White* for Tennessee Central Railroad Company.

## REPORT OF THE COMMISSION.

*McCHORD, Commissioner:*

Nashville, Tenn., through its Traffic Bureau as complainant, its Board of Trade, its Industrial Bureau, its Mayor and City Council, and the County of Davidson, as interveners, attacks the rate of \$1 per ton on coal to Nashville from Western Kentucky mines on the Louisville & Nashville Railroad and the Illinois Central Railroad, and from mines in Eastern Tennessee and in Alabama on the Nashville, Chattanooga & St. Louis Railway. The movement from the Tennessee mines is through Alabama and therefore interstate. The complaint is quite voluminous and the rate is challenged as being unreasonable inherently and relatively, and as unduly prejudicing Nashville and its shippers to the advantage of such other cities as Chattanooga, Knoxville, and Memphis, Tenn.; Louisville

and Covington, Ky.; Cincinnati, Ohio; and East St. Louis, Ill. The allegation of unjust discrimination is directed against the Louisville & Nashville and the Nashville, Chattanooga & St. Louis in so far as Chattanooga is said to be preferred, and against the Louisville & Nashville alone with respect to the other cities. The question of interline switching at Nashville is also placed in issue and will be treated separately herein.

Owensboro, Ky., is about 30 miles east of Henderson, Ky., both being on the Ohio River and between Louisville and St. Louis. South of Henderson the Louisville & Nashville main line from St. Louis is known as the Henderson division and extends to a station within a few miles of Nashville, at which station it connects with the main line running south from Louisville. The Owensboro division runs southeast to a few miles beyond Russellville, Ky. Leaving the main line at Memphis Junction, Ky., between Louisville and Nashville, the Memphis division runs due southwest to Memphis, intersecting the Owensboro division at Russellville and the Henderson division at Guthrie. Coal from the Henderson division moves through Guthrie direct to Nashville; from the Owensboro division it moves to Russellville, thence 19 miles over the Memphis division to Guthrie, whence to Nashville the route is the same as from Henderson. It is well here to note that coal moves from both these divisions to Memphis, the route up to Guthrie being identical with Nashville shipments, and the distance beyond being 216 miles over the Memphis division to Memphis or 49 miles over the Henderson division to Nashville.

From the Henderson division mines the average distance to Nashville is 110.62 miles; from the Owensboro division, 106.4; an average of 108.5 miles from the Louisville & Nashville Western Kentucky mines. From the Illinois Central mines in the same fields the average distance to Nashville is 167 miles, the coal reaching Nashville over the Tennessee Central Railroad. From the Nashville, Chattanooga & St. Louis mines in Eastern Tennessee and in Alabama the average distance to Nashville is 140 miles.

In support of their contentions complainants offer innumerable exhibits comparing on ton, car, and train mile bases the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi Rivers from mines in Kentucky, Tennessee, and Vir-

ginia; with rates on coal prescribed by this commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per-ton and per-car-mile rate received by defendants and other carriers on all traffic. In all of these instances the Nashville rate yields the greatest earnings. In elaborate detail defendants sought to analyze and rebut these comparisons in an endeavor to show that none was of any value in determining the reasonableness of the rate in issue.

To attempt to set forth the detail into which complainants and defendants went in support of their contentions as to the conclusions that properly might be drawn from these exhibits would require a more lengthy discussion than the facts in this case make necessary. Ton-mile statistics, reflecting as they do neither car loading, train tonnage, nor car or train mileage, are far from being infallible guides in fixing freight rates. A high average ton-mile revenue may be due to short hauls, a preponderance of which occasions the railroad traffic manager much uneasiness, while it has been repeatedly shown that traffic low in ton-mile earnings may, because of its farther carriage and greater density, be the most remunerative. Per-car earnings, with distance considered, are much more reliable. Where the commodity moves in trainloads the earnings per train mile furnish the best criterion, not only the car loading but also such physical conditions as grades, etc., being here reflected. Comparisons of any kind, however, to be effective, must be analagous, or nearly so; that is, the rate charged on gross earnings derived on any basis for the transportation of a given commodity between two points furnishes a guide in arriving at the rate to be charged upon the same or nearly the same commodity between two other points similarly circumstanced. Comparisons made with coal moving to the lakes for transshipment, to tidewater and between points in central freight association territory are of little value here because of the manifest difference in transportation conditions, particularly with respect to density of traffic, train tonnage and return empty hauls.

Chattanooga, Knoxville and East St. Louis have coal mines in their immediate vicinities, and such juxtaposition of supply and market must needs exercise a material influence over the rates from farther distant mines, thereby lessening the strength of the comparison.



On steam coal the \$1 per ton rate to Nashville, from Louisville & Nashville Western Kentucky mines, has been in effect since 1888. Domestic coal took a rate varying from 10 to 50 cents per ton higher. In 1896 the \$1 rate was made applicable to all except screened coal, which was given a rate of \$1.15, and this was the adjustment that obtained until December 1, 1898, when the rate on all grades of coal was fixed at \$1. For 25 years, therefore, the rate on steam coal has remained unchanged. In 1888 coal cars on the Louisville & Nashville could transport but 16 tons to the car, while the equipment of today hauls not less than 41 tons from these mines to Nashville. The tractive power of engines has also increased, and instead of 660 gross tons handled between Guthrie and Nashville in 1888, 1,165 gross tons are now handled. True the handling of coal in trainloads into Nashville appears to be the exception rather than the rule, but the increased tractive power of locomotives nevertheless is significant as tending to reduce the operating cost per unit of freight transported. But the volume of tonnage has also increased, the 193,000 tons handled in 1892 growing to nearly 450,000 tons in 1911. While there is mention of increased cost of labor and material, little more than a suggestion appears of record, and no attempt was made to show operating costs. Viewed alone, the Nashville rate, unchanged throughout its 25-year existence and producing a ton-mile revenue of 9.2 mills for an average haul of 108.5 miles, at least commands attention.

From these identical Western Kentucky fields coal is hauled over the same rails up to Guthrie en route to Memphis. As stated, the movement is thence 216 miles over the Memphis division, a total average distance of 276 miles for a rate of \$1.10, a per ton-mile revenue of slightly less than 4 mills. In other words, the Louisville & Nashville charges only 10 cents per ton more when the additional haul beyond Guthrie is 276 miles to Memphis than when it is 49 miles to Nashville. Any difference in transportation conditions, therefore, must be found beyond Guthrie. The capacity of engines is shown to be 1,165 gross tons from Guthrie to Nashville, 900 gross tons from Guthrie to Paris, Tenn., and 1,100 gross tons from Paris to Memphis. While it may be that the movement of coal to Memphis is somewhat heavier than to Nashville, there is nothing of record that indicates any substantial dissimilarity of operating conditions from these mines to either market. Defendants do not undertake to show any material difference in transportation conditions, but rely entirely upon their contention

that the Memphis rate was dictated by water transportation down the Mississippi River from the Pittsburgh, Pa., mines, as it will therefore be necessary to examine the conditions at Memphis which are said to limit the rate to that point.

The present rate of \$1.10 to Memphis became effective April 1, 1911, and is an advance of 10 cents over the rate which obtained during the preceding nine years. It was the subject of complaint to this Commission, and in *Memphis Freight Bureau vs. L. & N. R. R. Co.*, 26 I. C. C., 402, decided December 3, 1912, was found to be reasonable. In that case the history of the Memphis rate is completely reviewed, but will be briefly repeated here because of the earnestness with which defendants stress the river influence. When the Louisville & Nashville entered Memphis with coal from Western Kentucky, about 1882, it found the market supplied exclusively by Pittsburgh with coal which was barged down the river. Through the medium of its own coal-selling agency and with rates varying from \$1.40 to \$1.70 per ton it endeavored to meet the Pittsburgh competition until January 1, 1889, when the rate became fixed at \$1.40. This figure seems to have been amply low to insure Kentucky coal a market. In the meantime the Illinois Central entered Memphis from the same fields, but without any effect upon the rail rates. Then came the Kansas City, Memphis & Birmingham Railroad (now the 'Frisco) with a shorter haul from its Alabama mines, and railroad competition began, resulting in a rate of \$1.30 from Alabama and Kentucky in the latter part of 1889. Fluctuations between \$1.18 and \$1.40 occurred until 1897, when a rate of \$1.10 was established, this being increased to \$1.25 in 1889. The Kansas City, Memphis & Birmingham, desirous of securing the advantage of its shorter haul and in an endeavor also to offset the greater cost of mining in the Alabama fields, insisted upon maintaining a 10-cent differential under the Kentucky rate, and this insistence precipitated a rate war, which bore the rate down to 45 cents, after which, on October 26, 1901, a truce was declared and a rate of \$1.25 from all mines agreed upon. On August 7, 1902, this rate was reduced to \$1 and so remained until the advance to the present \$1.10 rate on April 1, 1911. That these facts do not support the theory that water competition fixes the present Memphis rate is at once apparent and was so found in the *Memphis Coal Case*, *supra*, where, at page 404, we said:

This rate history clearly shows active competition between both rail and water carriers at Memphis, though the

effect of the latter is now largely only potential and could not be considered as influencing either the \$1 or \$1.10 rate, especially in view of the fact that rates of \$1.40 and \$1.60 were in effect for more than the first six years that the Louisville & Nashville encountered Mississippi River competition. It would seem, therefore, that the controlling competition is between the carriers themselves, particularly the Kansas City, Memphis & Birmingham (now the Frisco), which line appears to be largely responsible for all of the reductions made since its entry into Memphis. . . . It is unnecessary to comment upon the river competition further than to say it has no effect upon these rates.

So far, then, as water-borne Pittsburgh coal is concerned, it may be said to have reached the maximum of its influence when the \$1.40 rate was established. That there is railroad competition at Memphis is manifest, but that this does not affect the Louisville & Nashville tonnage appears from the following:

The Louisville & Nashville, with 67.3 per cent of the total rail-coal tonnage to Memphis for the year 1910-11, experiences little discomfiture by reason of the 4.85 per cent handled by the Frisco, and is not seriously disturbed on account of the 24.92 per cent transported by the Illinois Central. *Memphis coal case, supra*, page 406.

But there is, or should be, equally as keen railroad competition at Nashville, and, on the whole, we are unable to find any substantial dissimilarity attaching to the transportation of coal from Western Kentucky mines on the Louisville & Nashville to Memphis and to Nashville. This, of course, excepts distance, which is greatly in favor of Nashville.

At Louisville much the same condition exists, and the 60-cent rate charged until June 1, 1913, by the Louisville & Nashville for its average haul of 142 miles in connection with the Louisville, Henderson & St. Louis Railroad, and by the Illinois Central for 125 miles, is offered for comparison by complainants, and the comparison opposed by defendants on the ground of water competition to Louisville from Pittsburgh and West Virginia mines. The Louisville coal rates from Western Kentucky have undergone a gradual reduction from \$1.50 in 1888 to \$1 in 1908, 70 and 75 cents in January, 1910, and finally 60 cents on February 28, 1910. On June 1,

1913, subsequent to the submission of this case, the rate was advanced to 65 cents. Before the route was established between the Louisville & Nashville and the Louisville, Henderson & St. Louis, which appears to have been about 1910, the Louisville & Nashville hauled its coal via Guthrie, a distance of 179.4 miles from its Owensboro mines and 225.6 miles from its Henderson division. There was considerable difference of opinion as to the cost of barging coal to Louisville from Pittsburgh. The Louisville & Nashville's principal witness expressed the opinion that such transportation might be had for 12.5 or 15 cents per ton, but these figures are unsubstantiated by proof and cannot be regarded as controverting our finding in *Slider vs. S. Ry. Co.*, 24 I. C. C., 312, 313, where we said:

"All the coal involved in this case comes down the Ohio River in barges from Pennsylvania and West Virginia fields. Louisville is 134 miles below Cincinnati, and it costs complainant about 50 cents per ton more to get his coal from the mines than it costs Cincinnati dealers."

If the barge rate is 50 cents per ton more to Louisville than to Cincinnati, irrespective of what might be the rate to Cincinnati, it can hardly be said that either the 60 or 65-cent rail rate is water-compelled. In fact, this is partially admitted by the leading witness for the Louisville & Nashville, who testified:

A 60-cent rate from Western Kentucky mines to Louisville is not made to meet the water competition into Louisville particularly or to meet the competition from Eastern Tennessee and Eastern Kentucky. It was made because the Illinois Central makes a rate of 60 cents a ton from Western Kentucky to Louisville. Our coal is in precisely the same vicinity as theirs; in some cases mines are served by both railroads, and manifestly we could not get a higher rate on coal from Western Kentucky mines into Louisville than is made by our immediate competitors.

Again, then, we find that rail carrier competition is the factor of prime consideration. The Louisville & Nashville, with a 17-mile longer haul, must meet the Illinois Central rate, while the latter relies almost entirely upon the river competition in differentiating conditions at Louisville and at Nashville. There are mines on the Louisville, Henderson & St. Louis, the nearest to Louisville being 86 miles, and the farthest 136 miles, from

which the rate is 50 cents, but the effect of this source of supply and the lower rate is not shown. The conditions, then, at Louisville are quite similar to those at Memphis, and at neither can they be said substantially to differ from those at Nashville. While we do not think a relationship in the matter of coal rates between these three cities should be established, we do think that a comparison of their rates properly may be drawn, giving some consideration to the fact that coal is now actually moving in considerable quantities by water to Louisville, but not permitting it to vitiate the effect of the comparison. Measured, then, by the rates to Memphis and to Louisville, the rate to Nashville is high.

Accepting the statements of defendants that the average loading of coal cars from the mines in question is 41 tons on the Louisville & Nashville and 34.5 tons on the Nashville, Chattanooga & St. Louis, we find the \$1 rate producing a car revenue of \$41 in one instance and \$34.50 in the other, or per car mile earnings of 37.78 cents and 24.64 cents, respectively. Assuming that all of this equipment is returned empty, the car-mile revenue for the loaded and empty movement is 18.89 cents and 12.32 cents, while the average loaded and empty car-mile revenue for all traffic during 1912 was 10.54 cents for the Louisville & Nashville and 10.8 for the Nashville, Chattanooga & St. Louis. The loading from the Illinois Central mines is not shown, but at 40 tons per car, producing a revenue of \$40 per car, the earnings per loaded car-mile for the 167-mile average haul would be 24 cents, or 12 cents per car mile for the loaded and empty movement; 34.5 tons to the car would produce a loaded car-mile rate of 26.65 cents, or 10.325 cents per car mile loaded and empty. The average car-mile earnings, loaded and empty, for all traffic during 1912 was 7.777 cents on the Illinois Central and 16.425 cents on the Tennessee Central.

As to the Louisville & Nashville, we are of opinion and find that the existing rate on coal to Nashville from Western Kentucky mines on its Owensboro and its Henderson divisions is unreasonable. We are of the same opinion and similarly find as to the Nashville, Chattanooga & St. Louis rate from its Tennessee and Alabama mines to Nashville. We further find that reasonable rates to Nashville from the Louisville & Nashville Western Kentucky mines on its Owensboro and its Henderson divisions should not exceed 80 cents per ton, and from the Nash-

ville, Chattanooga & St. Louis mines in Alabama and Tennessee, the movement from which is through Alabama, 90 cents per ton.

The Illinois Central does not reach Nashville. Its rails from Western Kentucky extend only about half way and the traffic is turned over to the Tennessee Central at Hopkinsville, Ky. This route is 58.5 miles longer than the Louisville & Nashville from the same field and 27 miles in excess of the Nashville, Chattanooga & St. Louis haul from East Tennessee and Alabama; besides, it embraces two separate and distinct carriers. Furthermore, little attack was made on this rate, complainants confining themselves almost entirely to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis rates. Under all the circumstances, we cannot find, upon this record, that the Illinois Central-Tennessee Central rate is unreasonable.

Reparation is asked, but under the circumstances of this case we do not think an award should be made.

#### THE NASHVILLE SWITCHING SITUATION.

The Louisville & Nashville Terminal Company is a corporation chartered in 1903, and its entire capital stock of \$100,000 is owned by the Louisville & Nashville. Of the \$2,535,000 funded debt, bonds to the amount of \$2,500,000 are outstanding in the hands of the public, the remainder being held in the treasury of the Louisville & Nashville. These bonds are guaranteed by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis. The terminal company owns certain terminal stations, 1.07 miles of main line, and 30.32 miles of sidings. In 1896 all of its property was leased for 999 years jointly to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis. Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have individually owned tracks which they operate independently each of the other or of the terminal company, and upon these tracks industries are located. To and from these sidings as well as to and from those on the rails of the terminal company traffic of all kinds is freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis.

Prior to 1907 neither of these roads would switch freight of any kind to or from the Tennessee Central, but in that year, "in deference to public opinion," they began switching all non-competitive traffic, *except coal*, to and from the Tennessee Central. The charge for this service is \$3 per car. Although both roads are emphatic in asserting that they have never considered the switching of coal from the Tennessee Central, the Nashville, Chattanooga & St. Louis did have effective rates applicable to and from its interchange with the Tennessee Central under which such a movement could have been accomplished for 60 cents per ton. Some surprise was expressed when this fact was developed at the hearing, and shortly thereafter this rate was cancelled. Complainants aver that this situation unjustly discriminates against coal from the Tennessee Central, that the practice with respect to switching coal at Nashville is unreasonable, and that the charge therefor (effective until shortly after the hearing) is unreasonable. While the switching tariff of the Tennessee Central is similar to those of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that road's refusal to switch coal from either of the other lines is in reality a retaliatory measure. It has styled itself a "cross-complainant" and favors this portion of petitioners' prayer. The other defendants insist that to require them to perform this switching would be to compel them to give the use of their terminal facilities to another carrier engaged in like business, in contravention of the proviso of Section 3; that their terminals are not now open to any except non-competitive traffic; and that, while coal may come from non-competitive points, the very nature of the commodity renders it competitive. As to the competitive character of the commodity there is little doubt; but why this attribute of coal is restricted to that from the Tennessee Central and finds no place with the coal from the Nashville, Chattanooga & St. Louis Tennessee and Alabama fields when it meets the Louisville & Nashville Kentucky coal, or vice versa, is neither clear nor defensible. It may be that these two roads regard themselves as a single entity, due to the ownership of the Louisville & Nashville of more than 70 per cent of the capital stock of the Nashville, Chattanooga & St. Louis; this would explain, but not justify. As we said in *Merchants & Mfrs.' Asso. of Baltimore vs. P. R. R. Co.*, 23 I. C. C., 474, 476, "Terminals are either open or they are not," and a carrier may not exercise an arbitrary discretion, based upon a strained construction of the proviso of Section 3, in saying for what roads and what traffic it will open its terminals and for what other roads and traffic it will

decline so to do. In this case the joint and the separately owned terminals of these two defendants are open to all of the traffic of the other; are open to all non-competitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate.

Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other. Defendants will be required to cease the unjust discrimination herein found to exist and to establish and apply for the future the practice herein found to be reasonable. This disposition of the case is in consonance with the principle enunciated by the Supreme Court in *U. S. vs. Terminal R. R. Asso. of St. Louis*, 224 U. S., 383.

The tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis provide that no charge will be made for switching between their respective lines at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic. This fact was not developed at the hearing, and no prayer is made for, nor is there any testimony touching upon, the absorption of switching at Nashville. Under their restricted practice no coal has been interswitched between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis on the one hand and the Tennessee Central on the other. A compliance with our order herein will remove this restriction. We cannot anticipate unjust discrimination with respect to absorption of switching charges, and no finding with respect thereto will be made on this record.

An order in accordance with these findings will be issued.



ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of December, A. D., 1913.

No. 4604.

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TRAFFIC BUREAU OF NASHVILLE, TENN.,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
THE LOUISVILLE & NASHVILLE TERMINAL COMPANY,  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
ILLINOIS CENTRAL RAILROAD COMPANY, AND  
TENNESSEE CENTRAL RAILROAD COMPANY.

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This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part thereof:

*It is ordered,* That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tenn.

*It is further ordered,* That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required, to establish, on or before February 15, 1914, upon no-

tice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tenn., rates not in excess of 80 cents per ton.

*It is further ordered*, That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal to Nashville, Tenn., from mines on its road in Alabama, and in Tennessee, the movement from which is through Alabama.

*It is further ordered*, That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads to Nashville, Tenn., from mines on its road in Alabama, and in Tennessee the movement from which is through Alabama, rates not in excess of 90 cents per ton.

*It is further ordered*, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from their present practice with respect to interswitching interstate carload shipments of coal at Nashville, Tenn.

*It is further ordered*, That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Cen-

tral Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.

*And it is further ordered*, That said defendants be, and they are hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the interswitching of interstate carload shipments of coal at Nashville, Tenn., a practice which will permit the interswitching of such shipments from and to the lines of each and every defendant.

By the Commission.

GEORGE B. MCGINTY, *Secretary*.

(SEAL)

Above answer of Interstate Commerce Commission and Exhibit A thereto, under one cover, endorsed:

Filed Feby. 10, 1914.

H. M. DOAK, *Clerk*.

On February 10, 1914, the following petition of the City of Nashville, Davidson County, and Traffic Bureau of Nashville, Tennessee, to intervene, was filed, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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In Equity. No. 21.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY,

*Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent.*

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*To the Honorable, the Judges of the District Court of the United  
States for the Middle District of Tennessee:*

The petition of the City of Nashville, Davidson County, one of the counties of the State of Tennessee, and the Traffic Bureau of Nashville, Tennessee, a corporation composed of merchants, manufacturers and shippers of the City of Nashville, all organized and existing under the laws of the State of Tennessee, to be made co-defendants to the original bill filed in this Court on February 5, 1914, by the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway, against the United States of America, in the above styled cause.

First—Your interveners respectfully show unto your Honors that on the second day of January, 1912, intervenor, Traffic Bureau of Nashville, filed with the Interstate Commerce Commission a complaint known as Docket No. 4604, before the Interstate Commerce Commission, and shortly after the filing of said complaint, interveners, City of Nashville and Davidson County filed intervening petitions before the Interstate Commerce Commission and by formal order of the Commission were permitted to intervene and were treated as parties thereto

with a right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief or oral argument.

Second—Your interveners show unto your Honors that the City of Nashville is a large consumer of coal, using approximately 21,000 tons per annum; that Davidson County consumes approximately 5,000 tons of coal per annum; and that the Traffic Bureau of Nashville numbers among its members practically every large receiver and consumer of coal at Nashville, Tennessee; that your interveners pay petitioners, Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway, large sums annually in the way of freight charges on coal, and are, therefore, vitally and financially interested in the proceedings in this cause.

Wherefore your interveners respectfully pray:

That your interveners be allowed to intervene and become co-defendants and be allowed to be heard by counsel in all of the proceedings had and taken in the above styled cause.

And further, that the original petition filed in this cause on February 5, 1914, by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway be denied in whole and that the orders of the Interstate Commerce Commission be allowed to become effective February 15, 1914.

T. J. McMorrough,

A. G. EWING & F. M. GARARD,

*Counsel for Intervenors.*

Above petition of City of Nashville, Davidson County and Traffic Bureau of Nashville, endorsed:

Filed February 10th, 1914.

H. M. DOAK, *Clerk.*

By F. B. McLEAN, *D. C.*

On February 10, 1914, the following order of intervention was entered in Equity Journal, Vol. A, page 50, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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In Equity. No. 21.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY, *Petitioners.*  
vs.  
UNITED STATES OF AMERICA, *Respondent.*

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ORDER OF INTERVENTION.

The City of Nashville, Davidson County and Traffic Bureau of Nashville, having filed and presented its petition for intervention herein, and the original petitioners making no objection thereto:

*It is ordered*, That the City of Nashville, Davidson County and Traffic Bureau of Nashville be and are hereby allowed to intervene and become parties by becoming intervening defendants and to be heard by their counsel in all the proceedings had and taken in the above entitled cause, the Court reserving the right at all times hereafter to enter such other and further order or orders concerning the right of the said interveners to appear and to be heard herein, and to enter such rule or rules concerning the pleadings of the said interveners and their course of procedure, as to the Court shall seem wise and proper.

February 10, 1914. Approved for entry.

By the Court: *SANFORD, Judge.*

Above order of intervention endorsed:

Entered Equity Journal, Volume A, page 50.

On February 10, 1914, the following affidavit of Geo. W. Lamb, and statement made a part thereof, was filed, to-wit:

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY, *Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent,*  
and  
INTERSTATE COMMERCE COMMISSION, *Intervener.*

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AFFIDAVIT OF GEO. W. LAMB, UPON MOTION  
FOR TEMPORARY INJUNCTION.

Affiant, Geo. W. Lamb, states that he is 40 years of age, resident of Louisville, Kentucky, and is Second Assistant Comptroller of the Louisville & Nashville Railroad Company; that he testified in what was known as the Memphis Coal Rate Case, before the Interstate Commerce Commission, I. C. C. Docket No. 3998, with reference to earnings and operating expenses of the Louisville & Nashville System, and with reference to the increases and decreases in the costs of operation of the Louisville & Nashville System, and that he was present to testify in what is known as the Nashville Coal Rate Case, which was initiated by the complaint of the Traffic Bureau of

Nashville, Tennessee, but that instead of his so testifying, his testimony in the Memphis Coal Rate Case was stipulated into the record in the Nashville Coal Rate Case.

That he has had drawn to his attention the statement in the report of the Interstate Commerce Commission in the case of Traffic Bureau of Nashville, Tennessee, known as the Nashville Coal Rate Case, Docket No. 4604, before the Commission, showing that in 1888 coal cars of the Louisville & Nashville Railroad Company could transport but 16 tons to the car, while the present equipment hauls not less than 41 tons from the Western Kentucky mines to Nashville; that the tractive power of engines has increased, that the volume of tonnage has increased, and that while there is mention of increased cost of labor and material little more than a suggestion appears of record and no attempt was made to show operating costs.

Affiant says that it was shown by exhibits filed by him in the Memphis Coal Rate Case, and it is true, that in spite of increases in the tonnage handled in the equipment of the Louisville & Nashville Railroad Company, and in spite of the increase in the tractive power of engines, and in spite of the increases in the volume of tonnage, and in spite of all other circumstances tending to increase the efficiency of operation, the increased costs of labor and material have been so great that the cost of earning a dollar of revenue on the lines of the Louisville & Nashville Railroad Company, or operating expense, increased from 60.43 cents in 1888 to 71.92 in 1911, and affiant attaches hereto and makes a part hereof a true and correct statement showing results of operation of the Louisville & Nashville Railroad Company during the thirty-three (33) years from July 1, 1878, to July 30, 1911, inclusive, and affiant says that this statement is substantially the same as the statements showing similar information filed by him in the Memphis Coal Case and marked Exhibit G. W. L. No. 40 in that case. Affiant says that said statement attached hereto is a true and correct statement.

Affiant further says that it was shown by him in said Memphis Coal Rate Case that the average cost per net ton mile, including taxes for the 5-year period ended June 30th, 1896, was .579 cents, and that the average cost per net ton mile for the 5-year period ended June 30th, 1911, was .580 cents.

And affiant further says that the cost per ton mile, excluding taxes for the fiscal year ended June 30, 1913, was



greater than the average cost per net ton mile, including taxes, for the five years ended June 30, 1911.

Affiant further says that the cost per net ton mile, excluding taxes for the fiscal year ended June 30, 1913, was .6 cents, and that the cost per net ton mile for the fiscal year ended June 30, 1913, including taxes, was .624 cents.

GEO. W. LAMB.

UNITED STATES OF AMERICA,  
STATE OF KENTUCKY,  
JEFFERSON COUNTY.      }    SCT

Subscribed and sworn to by Geo. W. Lamb before me, J. F. Davis, a Notary Public in and for the State and County aforesaid this 9th day of February, 1914. My commission as Notary Public expires on the 30th day of January, 1916.

In testimony whereof I have hereunto signed my name and affixed my notarial seal this 9th day of February, 1914.

(SEAL)

J. F. DAVIS,  
*Notary Public, Jefferson County, Ky.*

Above affidavit and statement made a part hereof, under one cover, endorsed:

Filed February 10, 1914.

H. M. DOAK, *Clerk,*  
By F. B. McLEAN, *D. C.*

On February 10, 1914, the following affidavit of C. B. Compton was filed, to-wit:

# ALSO SHOWING AVERAGE MILEAGE OPERATED CHARGES; NET OPERATING

YEAR ENDING JUNE 30TH.	AVERAGE MILEAGE OPERATED.	CROSS OPERATING REVENUES		
		AS CREDITED.	AMOUNTS DEDUCTED OR ADDED ACCOUNT OF FREIGHT ON COMPANY'S MATERIAL, HIRE OF EQUIPMENT, OUTSIDE OP- ERATIONS, AND RENTS FROM TRACKS, YARDS, AND TERMI- NALS TO PRODUCE PROPER BASIS FOR COMPARISONS.	AS DEBITED.
1	2	3	4	5
1879	969.44	\$5,387,595.54	\$246,074.16	\$5,141,521.38
1880	1,232.64	7,435,843.04	395,172.04	7,040,671.00
1881	1,845.33	10,911,650.63	618,756.51	10,292,894.12
1882	1,973.40	11,987,744.55	586,338.65	11,401,405.90
1883	2,033.09	13,234,916.28	670,391.39	12,564,524.89
1884	2,065.27	14,351,092.81	789,709.79	13,561,383.02
1885	2,056.94	13,936,346.47	706,460.80	13,229,885.67
1886	2,334.64	13,754,896.42	641,567.03	13,113,329.39
1887	2,338.64	15,731,695.53	631,922.27	15,101,773.26
1888	2,447.91	17,122,025.53	756,614.78	16,365,410.75
1889	2,589.16	17,471,821.80	867,680.39	16,604,141.41
1890	2,625.77	19,837,543.97	969,080.28	18,868,463.69
1891	2,845.66	20,804,646.59	981,644.62	19,823,001.97
1892	3,136.82	21,815,135.53	965,255.07	20,849,880.46
1893	3,134.28	22,733,864.40	1,175,614.64	21,558,249.76
1894	3,149.02	19,231,197.73	784,524.11	18,446,673.62
1895	3,149.02	19,565,551.36	826,342.67	18,739,208.69
1896	3,140.65	20,688,318.91	811,123.40	19,877,195.51
1897	3,140.71	20,692,665.55	814,470.93	19,878,194.62
1898	3,147.94	22,414,358.21	1,058,691.88	21,355,666.33
1899	3,147.94	24,277,516.99	1,232,744.54	23,044,772.45
1900	3,199.84	28,451,746.11	1,508,707.45	26,943,038.66
1901	3,269.25	28,199,113.40	263,774.83	27,935,338.57
1902	3,423.06	30,870,533.88	72,937.69	30,797,596.19
1903	3,491.25	35,568,483.43	59,323.08	35,509,160.35
1904	3,655.69	37,010,656.28	25,288.03	36,985,368.25
1905	3,868.45	38,599,660.26	81,615.49	38,518,044.77
1906	4,130.91	43,008,996.23	41,673.66	42,967,322.57
1907	4,306.33	48,263,945.20	55,289.11	48,208,656.09
1908	4,347.80	44,620,281.16	285,584.90*	44,334,696.26
1909	4,393.11	45,425,891.45	300,333.40*	45,125,558.05
1910	4,554.30	52,433,381.94	301,480.84*	52,131,901.10
1911	4,598.39	53,993,740.78	288,334.46*	53,705,406.32

\*Rents received for Tracks, Yards, and Other Facilities added.

†Year 1908: Depreciation—Way and Structures, \$1,380,000.00; Rents paid for

‡Year 1909: Depreciation—Way and Structures, \$1,380,000.00; Rents paid for

§Years 1910 and 1911: Rents paid for Tracks, Yards, and Other Facilities, and

# STATEMENT SHOWING RESULTS OF OPERATION OF RATED; OPERATING REVENUES AS CREDITED; ADJUSTMENTS IN OPERATING REVENUES TO PRODUCE PROPER C ATING REVENUE AFTER DEDUCTING OPERATING EXPENSES, TAXES, INTEREST, AND OTHER FIXED CHARGES; AVER

## SECTION ONE

AS ADJUSTED.	OPERATING EXPENSES			NET OPERATING REVENUE, AS ADJUSTED.	TAXES.	OPERATING EXPENSES AS ADJUSTED, AND TAXES.	NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCTING TAXES.	INTEREST AND FIXED CHARGES
	AS CHARGED.	AMOUNTS DEDUCTED OR ADDED ACCOUNT OF FREIGHT ON COMPANY'S MATERIAL, HIRE OF EQUIPMENT, RENTS FOR TRACKS, YARDS, AND TERMI- NALS. DEPRECIATION—WAY AND STRUCTURES, AND TAXES.	AS ADJUSTED.					
5	6	7	8	9	10	11	12	13
\$5,141,521.38	\$3,155,823.78	\$173,936.48	\$2,981,887.30	\$2,159,634.08	\$62,032.39	\$3,043,919.69	\$2,097,601.69	\$1,836.30
7,040,671.00	4,208,199.41	196,370.43	4,011,828.98	3,028,842.02	69,667.40	4,081,496.38	2,959,174.62	2,119.40
10,292,894.12	6,713,132.31	552,949.29	6,160,183.02	4,132,711.10	215,391.73	6,375,574.75	3,917,319.37	2,994.40
11,401,405.90	7,429,370.35	573,583.19	6,855,787.16	4,545,618.74	309,238.44	7,165,025.60	4,236,380.30	3,854.40
12,564,524.89	8,099,595.75	678,863.19	7,420,732.56	5,143,792.33	339,409.18	7,760,141.74	4,804,383.15	4,459.40
13,561,383.02	8,823,782.56	856,908.69	7,966,873.87	5,594,509.15	309,452.38	8,276,326.25	5,285,056.77	4,424.40
13,229,885.67	8,182,255.02	807,272.49	7,374,982.53	5,854,903.14	379,845.55	7,754,828.08	5,475,057.59	4,361.40
13,113,329.39	8,664,467.31	770,085.38	7,894,381.93	5,218,947.46	398,301.86	8,292,683.79	4,820,645.60	4,619.40
15,099,773.26	9,572,507.78	920,561.68	8,651,946.10	6,447,827.16	390,954.72	9,042,900.82	6,056,872.44	4,577.40
16,365,410.75	10,938,444.90	1,048,421.46	9,890,023.44	6,475,387.31	410,300.49	10,300,323.93	6,065,086.82	4,669.40
16,604,141.41	11,043,285.56	1,109,040.18	9,934,245.38	6,669,896.03	445,135.85	10,379,381.23	6,224,760.18	4,797.40
18,868,463.69	12,249,250.25	1,230,348.02	11,018,902.23	7,849,561.46	443,364.36	11,462,266.59	7,406,197.10	4,847.40
19,823,001.97	13,312,659.30	1,280,066.71	12,032,592.59	7,790,409.38	462,728.45	12,495,321.04	7,327,680.93	4,752.40
20,849,880.46	14,235,775.24	1,254,252.87	12,981,522.37	7,868,358.09	526,977.86	13,508,500.23	7,341,380.23	5,127.40
21,558,249.76	14,670,055.07	1,412,695.58	13,257,359.49	8,300,890.27	588,564.62	13,845,924.11	7,712,325.65	5,427.40
18,446,673.62	12,086,138.53	889,993.66	11,196,144.87	7,250,528.75	610,027.66	11,806,172.53	6,640,501.09	5,297.40
18,739,208.69	12,513,395.07	958,635.47	11,554,759.60	7,194,449.09	579,003.48	12,133,753.08	6,605,445.61	5,447.40
19,877,195.51	13,747,383.84	988,183.56	12,759,200.28	7,117,995.23	590,120.28	13,349,320.56	6,527,874.95	5,537.40
19,878,194.62	14,077,777.39	989,961.14	13,087,816.25	6,790,378.37	597,760.37	13,685,576.62	6,192,618.00	5,467.40
21,355,666.33	15,191,315.46	1,158,920.64	14,032,394.82	7,323,271.51	650,290.02	14,682,684.84	6,672,981.49	5,317.40
23,044,772.45	16,027,242.10	1,322,191.34	14,705,050.76	8,339,721.69	869,493.56	15,574,544.32	7,470,228.13	5,317.40
26,943,038.66	19,065,721.61	1,148,332.55	17,917,359.06	9,025,649.60	845,452.13	18,762,841.19	8,180,197.47	5,327.40
27,935,338.57	18,396,918.95	329,022.46	18,067,896.49	9,867,442.08	817,271.47	18,885,167.96	9,050,170.61	5,257.40
30,797,596.19	21,018,587.57	342,915.84	20,674,671.73	10,122,924.46	834,795.91	21,509,467.64	9,288,128.55	5,197.40
35,509,160.35	24,049,461.18	372,623.68	23,676,837.50	11,832,322.85	991,833.48	24,668,670.98	10,840,489.37	5,097.40
36,985,368.25	25,189,848.72	360,350.89	24,829,497.83	12,155,870.42	922,373.19	25,751,871.02	11,233,497.23	5,647.40
38,518,044.77	26,546,340.00	371,169.99	26,175,170.01	12,342,874.76	1,089,668.16	27,264,838.17	11,253,206.60	5,507.40
42,967,322.57	30,933,463.71	369,295.10	30,564,168.61	12,403,153.96	1,147,213.73	31,711,382.34	11,255,940.23	5,917.40
48,208,656.09	35,781,302.54	280,468.49	35,500,834.05	12,707,822.04	1,213,824.44	36,714,658.49	11,439,997.60	6,267.40
44,905,866.06	33,594,291.05	1,960,861.34†	35,555,152.39	9,350,713.67	1,402,159.63	36,957,312.02	7,948,554.04	6,487.40
45,726,224.85	29,627,499.48	1,947,306.59†	31,574,806.07	14,151,418.78	1,439,128.62	33,013,934.69	12,712,290.16	6,487.40
52,734,862.78	34,985,578.78	559,830.32‡	35,545,409.10	17,189,453.68	1,603,284.94	37,148,694.04	15,586,168.74	6,187.40
54,282,075.24	38,479,822.61	559,625.97‡	39,039,448.58	15,242,626.66	1,939,079.59	40,978,528.17	13,303,547.07	5,997.40

aid for Tracks, Yards, and Other Facilities, \$480,185.22; Hire of Equipment—Cr., \$100,676.12, added.  
 aid for Tracks, Yards, and Other Facilities, \$567,306.59, added.  
 es, added.

# LOUISVILLE & NASHVILLE RAILROAD COM

OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY DURING T  
PER COMPARISONS; OPERATING REVENUES AS ADJUSTED; OPERATING EXPENSES AS CHARGED; ADJUSTMENTS  
AVERAGE PER MILE OF ROAD OPERATED; PERCENTAGES OF OPERATING EXPENSES, TAXES, INTEREST, AND OTHER

## SECTION TWO

INTEREST AND OTHER FIXED CHARGES.	TOTAL TAXES, INTEREST AND OTHER FIXED CHARGES.	TOTAL OPERATING EXPENSES AS ADJUSTED, TAXES, INTEREST, AND OTHER FIXED CHARGES.	NET OPERATING REVENUE AS ADJUSTED AFTER DE- DUCTING OPERATING EX- PENSES AS ADJUSTED, TAXES, INTEREST, AND OTHER FIXED CHARGES.	GROSS OPERAT- ING REVENUES AS ADJUSTED, PER MILE.	OPERATING EXPENSES AS ADJUSTED, PER MILE.	NET OPERATING REVENUE AS ADJUSTED, PER MILE.	TAXES, PER MILE.	OPERATING EXPENSES AS ADJUSTED, AND TAXES, PER MILE.	NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCTING TAXES, PER MILE.	INT ON E N
13	14	15	16	17	18	19	20	21	22	
\$1,836,886.23	\$1,898,918.62	\$4,880,805.92	\$260,715.46	\$5,303.60	\$3,075.89	\$2,227.71	\$63.99	\$3,139.88	\$2,163.72	
2,119,059.61	2,188,727.01	6,200,555.99	840,115.01	5,711.86	3,354.66	2,457.20	56.52	3,311.18	2,400.68	
2,995,010.19	3,210,401.92	9,370,584.94	922,309.18	5,577.81	3,338.26	2,239.55	116.72	3,454.98	2,122.83	
3,854,414.94	4,163,653.38	11,019,440.54	381,965.36	5,777.54	3,474.09	2,303.45	156.70	3,630.79	2,146.75	
4,459,203.11	4,789,612.29	12,219,344.85	345,180.04	6,180.01	3,649.98	2,530.03	166.94	3,816.92	2,363.09	
4,424,835.14	4,734,287.52	12,701,161.39	860,221.63	6,566.40	3,857.55	2,708.85	149.84	4,007.39	2,559.01	
4,361,124.08	4,740,969.63	12,115,952.16	1,113,933.51	6,431.83	3,585.41	2,846.42	184.67	3,770.08	2,661.75	
4,619,840.15	5,018,142.01	12,912,523.94	200,805.45	5,616.85	3,381.42	2,235.43	170.61	3,552.03	2,064.82	
4,571,118.77	4,962,073.49	13,614,019.59	1,485,753.67	6,456.65	3,699.56	2,757.09	157.17	3,866.73	2,589.92	
4,664,855.13	5,075,155.62	14,965,179.06	1,400,231.69	6,685.46	4,040.19	2,645.27	167.61	4,207.80	2,447.66	
4,797,569.12	5,242,704.97	15,176,950.35	1,427,191.06	6,412.94	3,836.86	2,576.08	171.92	4,008.78	2,404.16	
4,848,504.54	5,291,868.90	16,310,771.13	2,557,692.56	7,185.88	4,196.45	2,989.43	168.85	4,365.30	2,820.58	
4,754,295.59	5,217,024.04	17,249,616.63	2,573,385.34	6,966.05	4,228.40	2,737.65	162.62	4,391.02	2,575.03	
5,125,690.50	5,652,668.36	18,634,190.73	2,215,689.73	6,646.82	4,138.44	2,508.38	168.00	4,306.44	2,340.38	
5,428,464.95	6,017,029.57	19,274,389.06	2,283,860.70	6,878.21	4,229.79	2,648.42	187.78	4,417.57	2,460.64	
5,291,944.33	5,901,971.99	17,098,116.86	1,348,556.76	5,857.91	3,555.44	2,302.47	193.72	3,749.16	2,108.75	
5,445,905.47	6,024,908.95	17,579,668.55	1,159,540.14	5,950.81	3,669.32	2,281.49	183.86	3,853.18	2,097.63	
5,538,981.63	6,129,101.91	18,888,302.19	988,893.32	6,329.01	4,062.60	2,266.41	187.90	4,250.50	2,078.51	
5,468,065.95	6,065,826.32	19,153,642.57	724,552.05	6,329.20	4,167.15	2,162.05	190.33	4,356.48	1,971.72	
5,319,942.66	5,970,232.68	20,002,627.50	1,353,038.83	6,784.01	4,457.64	2,326.37	206.58	4,664.22	2,119.79	
5,317,738.35	6,187,231.91	20,892,282.67	2,152,489.78	7,320.58	4,671.32	2,649.26	276.22	4,947.54	2,373.04	
5,320,338.14	6,165,790.27	24,083,179.33	2,859,859.33	8,420.12	5,599.46	2,820.66	264.22	5,863.68	2,556.44	
5,255,126.58	6,072,398.05	24,140,294.54	3,795,044.03	8,544.88	5,526.62	3,018.26	249.99	5,776.61	2,768.27	
5,190,025.15	6,024,821.06	26,099,492.79	4,098,103.40	8,997.12	6,039.84	2,057.28	243.87	6,283.71	2,713.41	
5,092,866.92	6,084,700.40	29,761,537.90	5,747,622.45	10,170.90	6,781.77	3,389.13	254.09	7,065.86	3,105.04	
5,640,205.84	6,562,579.03	31,392,076.86	5,593,291.39	10,117.21	6,792.01	3,325.20	252.31	7,044.32	3,072.89	
5,561,043.44	6,740,711.60	32,915,881.61	5,602,163.16	9,956.97	6,766.32	3,190.65	281.68	7,048.00	2,908.97	
5,916,296.07	7,063,509.80	37,627,678.41	5,339,644.16	10,401.42	7,398.89	3,002.53	277.71	7,676.60	2,724.82	
6,266,967.08	7,840,791.52	42,981,625.57	5,227,030.52	11,194.84	8,243.87	2,950.97	281.87	8,525.74	2,669.10	
6,485,481.00	7,887,640.63	43,442,793.02	1,463,073.04	10,328.41	8,177.73	2,150.68	322.50	8,500.23	1,828.18	
6,480,576.46	7,919,705.08	39,494,511.15	6,231,713.70	10,408.62	7,187.35	3,221.27	327.59	7,514.94	2,893.68	
6,187,072.91	7,790,357.85	43,335,766.95	9,399,095.83	11,579.14	7,804.80	3,774.34	352.04	8,156.84	3,422.30	
5,990,411.11	7,929,556.40	46,969,004.98	7,313,070.26	11,804.58	8,489.81	3,314.77	421.69	8,911.50	2,893.08	

# COMPANY

THIRTY-THREE YEARS FROM JULY 1, 1878, TO JUNE 30, 1911, INCLUS  
 TS IN OPERATING EXPENSES TO PRODUCE PROPER COMPARISONS; OPERATING EXPENSES AS ADJUSTED; NET  
 OTHER FIXED CHARGES, TO GROSS OPERATING REVENUES; AND THE RETURN TO STOCKHOLDERS IN THE WAY OF C

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SECTION TH

INTEREST, AND OTHER FIXED CHARGES, PER MILE.	TOTAL TAXES, INTEREST, AND OTHER FIXED CHARGES, PER MILE.	TOTAL OPERATING EXPENSES AS ADJUSTED, TAXES, INTEREST, AND OTHER FIXED CHARGES, PER MILE.	NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCT- ING OPERATING EXPENSES AS ADJUSTED, TAXES, IN- TEREST, AND OTHER FIXED CHARGES, PER MILE.	PERCENTAGE OF OPERATING EXPENSES AS ADJUSTED TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF NET REVENUE AS ADJUSTED TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF TAXES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF OPERATING EXPENSES AS ADJUSTED AND TAXES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCTING TAXES TO GROSS OPERATING REVENUES AS ADJUSTED.
23	24	25	26	27	28	29	30	31
\$1,894.79	\$1,958.78	\$5,034.67	\$268.93	58.00	42.00	1.21	59.21	40.79
1,719.12	1,775.64	5,030.30	681.56	56.98	43.02	.99	57.97	42.03
1,623.03	1,739.74	5,078.00	499.81	59.85	40.15	2.09	61.94	38.06
1,053.18	2,109.88	5,583.97	193.57	60.13	39.87	2.71	62.84	37.16
2,188.31	2,360.25	6,010.23	169.78	59.06	40.94	2.70	61.76	38.24
2,142.50	2,292.34	6,149.89	416.51	58.75	41.25	2.28	61.03	38.97
2,120.20	2,304.87	5,890.28	541.55	55.74	44.26	2.87	58.61	41.39
1,978.82	2,149.43	5,530.85	86.00	60.20	39.80	3.04	63.24	36.76
1,954.61	2,121.78	5,821.34	635.31	57.30	42.70	2.59	59.89	40.11
1,905.65	2,073.26	6,113.45	572.01	60.43	39.57	2.51	62.94	37.06
1,852.94	2,024.86	5,861.72	551.22	59.83	40.17	2.68	62.51	37.49
1,846.51	2,015.36	6,211.81	974.07	58.40	41.60	2.35	60.75	39.25
1,670.72	1,833.34	6,061.74	904.31	60.70	39.30	2.33	63.03	36.97
1,634.03	1,802.03	5,940.47	706.35	62.26	37.74	2.53	64.79	35.21
1,731.97	1,919.75	6,149.54	728.67	61.50	38.50	2.73	64.23	35.77
1,680.50	1,874.22	5,429.66	428.25	60.69	39.31	3.31	64.00	36.00
1,729.40	1,913.26	5,582.58	368.23	61.66	38.34	3.09	64.75	35.25
1,763.64	1,951.54	6,014.14	314.87	64.19	35.81	2.97	67.16	32.84
1,741.02	1,931.35	6,098.50	230.70	65.84	34.16	3.01	68.85	31.15
1,689.98	1,896.56	6,354.20	429.81	65.71	34.29	3.05	68.76	31.24
1,689.27	1,965.49	6,636.81	683.77	63.81	36.19	3.77	67.58	32.42
1,662.69	1,926.91	7,526.37	893.75	66.50	33.50	3.14	69.64	30.36
1,607.44	1,857.43	7,384.05	1,160.83	64.68	35.32	2.93	67.61	32.39
1,516.20	1,760.07	7,799.91	1,197.21	67.13	32.87	2.71	69.84	30.16
1,458.75	1,742.84	8,524.61	1,646.29	66.68	33.32	2.79	69.47	30.53
1,452.86	1,705.17	8,497.18	1,620.03	67.13	32.87	2.49	69.62	30.38
1,460.80	1,742.48	8,508.80	1,448.17	67.96	32.04	2.83	70.79	29.21
1,432.20	1,709.91	9,108.80	1,292.62	71.13	28.87	2.67	73.80	26.20
1,455.29	1,737.16	9,981.03	1,213.81	73.64	26.36	2.52	76.16	23.84
1,491.67	1,814.17	9,991.90	336.51	79.18	20.82	3.12	82.30	17.70
1,475.17	1,802.76	8,990.11	1,418.51	69.05	30.95	3.15	72.20	27.80
1,358.51	1,710.55	9,515.35	2,063.79	67.40	32.60	3.04	70.44	29.56
1,302.73	1,724.42	10,214.23	1,509.35	71.92	28.08	3.57	75.49	24.51



# 30, 1911, INCLUSIVE.

EXPENSES AS ADJUSTED; NET OPERATING REVENUE AS ADJUSTED; TAXES, INTEREST, AND OTHER FIXED CHARGES TO GROSS OPERATING REVENUES AS ADJUSTED; CASH DIVIDENDS, FOR EACH YEAR OF THE PERIOD.

SECTION THREE							
PERCENTAGE OF OPERATING EXPENSES AS ADJUSTED AND TAXES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCTING TAXES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF INTEREST AND OTHER FIXED CHARGES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF TOTAL TAXES, INTEREST, AND OTHER FIXED CHARGES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF TOTAL OPERATING EXPENSES AS ADJUSTED, TOTAL TAXES, INTEREST, AND OTHER FIXED CHARGES TO GROSS OPERATING REVENUES AS ADJUSTED.	PERCENTAGE OF NET OPERATING REVENUE AS ADJUSTED AFTER DEDUCTING OPERATING EXPENSES AS ADJUSTED, TOTAL TAXES, INTEREST, AND OTHER FIXED CHARGES TO GROSS OPERATING REVENUES AS ADJUSTED.	CASH DIVIDENDS.	PERCENTAGE OF CASH DIVIDENDS TO GROSS OPERATING REVENUES AS ADJUSTED.
30	31	32	33	34	35	36	37
59.21	40.79	35.72	36.93	94.93	5.07	\$361,445.50	7.03
57.97	42.03	30.10	31.09	88.07	11.93	724,567.00	10.29
61.94	38.06	29.10	31.19	91.04	8.96	1,087,800.00	10.57
62.84	37.16	33.81	36.52	96.65	3.35	543,900.00	4.77
61.76	38.24	35.49	38.19	97.25	2.75	Suspended	-----
61.03	38.97	32.63	34.91	93.66	6.34	Suspended	-----
58.61	41.39	32.96	35.83	91.57	8.43	Suspended	-----
63.24	36.76	35.23	38.27	98.47	1.53	Suspended	-----
59.89	40.11	30.27	32.86	90.16	9.84	Suspended	-----
62.94	37.06	38.50	31.01	91.44	8.56	Suspended	-----
62.51	37.49	28.89	31.57	91.40	8.60	Suspended	-----
60.75	39.25	25.70	28.05	86.45	13.55	518,167.10	2.75
63.03	36.97	23.99	26.32	87.02	12.98	2,400,000.00	12.11
64.79	35.21	24.58	27.11	89.37	10.63	2,376,000.00	11.40
64.23	35.77	25.18	27.91	89.41	10.59	2,112,000.00	9.80
64.00	36.00	28.69	32.00	92.69	7.31	Suspended	-----
64.75	35.25	29.06	32.15	93.81	6.19	Suspended	-----
67.16	32.84	27.87	30.84	95.03	4.97	Suspended	-----
68.85	31.15	27.51	30.52	96.36	3.64	Suspended	-----
68.76	31.24	24.91	27.96	93.67	6.33	Suspended	-----
67.58	32.42	23.08	26.85	90.66	9.34	1,848,000.00	8.02
69.64	30.36	19.75	22.89	89.39	10.61	2,112,000.00	7.84
67.61	32.39	18.81	21.74	86.42	13.58	2,695,000.00	9.65
69.84	30.16	16.85	19.56	86.69	13.31	2,875,000.00	9.34
69.47	30.53	14.34	17.13	83.81	16.19	3,000,000.00	8.45
66.2	30.38	15.25	17.74	84.87	15.13	3,000,000.00	8.11
70.79	29.21	14.67	17.50	85.46	14.54	3,600,000.00	9.35
73.80	26.20	13.77	16.44	87.57	12.43	3,600,000.00	8.38
76.16	23.84	13.00	15.52	89.16	10.84	3,600,000.00	7.47
82.30	17.70	14.44	17.56	96.74	3.26	3,300,000.00	7.35
72.20	27.80	14.17	17.32	86.37	13.63	3,300,000.00	7.22
70.44	29.56	11.73	14.77	82.17	17.83	4,200,000.00	7.96
75.49	24.51	11.04	14.61	86.53	13.47	4,200,000.00	7.74

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TEN-  
NESSEE, NASHVILLE DIVISION.

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In Equity. No. 21.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
*Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent,*  
and  
INTERSTATE COMMERCE COMMISSION, *Intervener.*

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AFFIDAVIT OF C. B. COMPTON UPON MOTION FOR  
PEREMPTORY INJUNCTION.

Affiant, C. B. Compton, states that he is Freight Traffic Manager of the Louisville & Nashville Railroad Company, one of the petitioners in the above entitled proceeding; that he is familiar with the orders of the Interstate Commerce Commission complained of in said proceeding and with the effect which the enforcement of said orders would have upon the business of petitioner, Louisville & Nashville Railroad Company, and that unless the orders complained of are immediately enjoined, set aside, annulled, or suspended, petitioner will, by reason of the enormous penalties provided by the Act to Regulate Commerce for failure to comply with an order of the Interstate Commerce Commission, be compelled to put said orders of the Interstate Commerce Commission into effect by filing on or before February 10, 1914, rates and practices effective February 15,

1914, as provided in said orders, and that irreparable damage would consequently ensue to petitioner, Louisville & Nashville Railroad Company, and that the nature of such irreparable damage is as follows, to-wit:

There would be a reduction and loss of revenue to the Louisville & Nashville Railroad Company on coal business received at Nashville, Tennessee, of not less than Ninety Thousand (\$90,000.00) Dollars per annum, and there would be a further loss to petitioner, Louisville & Nashville Railroad Company, resulting from the requirement that the Louisville & Nashville Railroad Company give the use of its tracks and terminal facilities at Nashville, Tennessee, to another and competing carrier, the Tennessee Central Railroad, which is engaged in like business to that point.

And if the reduced rates provided in the orders complained of are put into effect and the revenues of the Louisville & Nashville Railroad Company are accordingly reduced, as above set forth, and it should be subsequently determined that said orders are unlawful or beyond the power of the Commission to make, the Louisville & Nashville Railroad Company would not be able to make collection of the undercharges from the shippers or consignees of the freight, and would be unable in any way to repair the damage suffered through reduction of its rates by said orders.

And likewise, if it should be subsequently determined that said orders with respect to switching at Nashville are unlawful or beyond the power of the Commission to make, the Louisville & Nashville Railroad Company would be unable in any way to repair the damage suffered through the giving of the use of its tracks and terminal facilities to another and competing carrier engaged in like business.

C. B. COMPTON.

UNITED STATES OF AMERICA,  
STATE OF KENTUCKY,  
JEFFERSON COUNTY.

} SCT.

Subscribed and sworn to by C. B. Compton before me, J. F. Davis, a Notary Public in and for the State and County aforesaid, this 9th day of February, 1914. My commission as Notary Public expires on the 20th day of January, 1916.



In testimony whereof I have hereunto signed my name and affixed my notarial seal this 9th day of February, 1914.

(SEAL)

J. F. DAVIS,  
*Notary Public, Jefferson County, Kentucky.*

Above affidavit of C. B. Compton endorsed:

Filed February 10, 1914.

H. M. DOAK, *Clerk.*  
By F. B. McLEAN, D. C.

On September 1, 1914, at 8:00 A.M., the following *per curiam* opinion of the Court was filed, to-wit:

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IN THE DISTRICT COURT OF THE UNITED STATES,  
MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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LOUISVILLE & NASHVILLE RAILROAD CO., Et al.

vs.

UNITED STATES OF AMERICA Et al.

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In Equity. No. 21.

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Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges.

*Per Curiam.* The Louisville & Nashville Railroad Co. and the Nashville, Chattanooga & St. Louis Railway, hereinafter called the Louisville & Nashville Railroad and Nashville & Chat-

tanooga Railway, respectively, having filed herein a petition against the United States of America to set aside certain orders made by the Interstate Commerce Commission in reference to rates for the interstate transportation of coal to Nashville, Tennessee, and the switching of interstate shipments of coal at Nashville, moved for an interlocutory injunction restraining the enforcement of these orders *pendente lite*; which motion was heard by three judges, as provided by the Urgency Deficiency Act of October 22, 1913, c. 32. The hearing was had upon the petition; the answers of the United States, and of the Commission, the City of Nashville, Davidson County, Tennessee, and the Traffic Bureau of Nashville, who intervened as defendants, under Section 212 of The Judicial Code; and affidavits filed by the petitioners.

The orders sought to be enjoined were made by the Commission in proceedings instituted on the complaint of the Traffic Bureau of Nashville against the petitioners, the Illinois Central Railroad Company and the Tennessee Central Railroad Company, hereinafter called the Illinois Central Railroad and Tennessee Central Railroad, respectively, alleging, among other things, that the rate of \$1.00 per ton then charged by the petitioners for the interstate transportation of coal to Nashville from certain points in Kentucky, Tennessee and Alabama were unjust and unreasonable, and that certain switching practices of the petitioners at Nashville subjected the interstate traffic in coal to undue and unreasonable prejudice and disadvantage. Answers having been filed and evidence taken, the Commission made its written report, containing its findings of fact and conclusions thereon (*Traffic Bureau of Nashville vs. Louisville & Nashville Railroad*, 28 I. C. C., 532), and issued an order making such findings and conclusions a part thereof, and, in accordance therewith, requiring that the Louisville & Nashville Railroad should, for not less than two years, cease from charging its then rates for the transportation of coal to Nashville from mines in Western Kentucky on its Owensboro and Henderson divisions, and should establish and maintain rates thereon not exceeding 80 cents per ton; that the Nashville & Chattanooga Railway should, for a like period, cease from charging its then rates for the transportation of coal to Nashville from mines on its road in Alabama and Tennessee, through Alabama, and should establish and maintain rates thereon not exceeding 90 cents per ton; and that each of said companies should, for a like period, abstain from their then practice with respect to interswitching interstate

carload shipments of coal at Nashville and from maintaining any different practice with respect to switching such shipments from and to the tracks of the Tennessee Central Railroad from that maintained with respect to similar shipments from and to their respective tracks, and should establish and maintain a practice permitting the interswitching of such shipments from and to the lines of each and every defendant.

The petitioners did not file the transcript of the record before the Commission, and do not insist, for the purpose of the motion, that the facts found by the Commission were either without substantial evidence to support them or contrary to the indisputable character of the evidence. The sole grounds of the motion for the interlocutory injunction are: No. P (1) that the facts found by the Commission do not, as a matter of law, support the orders made by it; (2) that the Commission was without jurisdiction to make the orders; and (3) that the enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

The petitioners furthermore state explicitly in their brief that in determining these issues the findings of fact made by the Commission in its report will be assumed to be "undisputed," but that they "contend that findings of fact do not as a matter of law support the conclusions (and) the orders of the Commission complained of, and that the Commission was without jurisdiction to make the orders."

*Order fixing rates.* The report of the Commission set forth the geographical location of the various points involved under the rates in question, with the distances and routes of transportation between them, showing that the average distance to Nashville from Western Kentucky mines on the Louisville & Nashville Railroad was 108.5 miles, and from the Eastern Tennessee and Alabama mines on the Nashville & Chattanooga Railway, 140 miles. (28 I. C. C., at p. 534.) It then stated that the complainant had offered "innumerable exhibits" comparing the Nashville rate, on ton, car, and train mile basis, with the rates on coal obtaining north of the Ohio River, the rates to East St. Louis, Louisville and other points on the Ohio and Mississippi Rivers from mines in Kentucky, Tennessee and Virginia, the rates on coal prescribed by the Commission in a number of cases, the rates on coal to Chattanooga, and cer-

tain Southeastern destinations, the rates on coal from other mines to Nashville, and the rates on other commodities to Nashville and other destinations, and with the average per-ton and per-car-mile rate received by the defendants and other carriers on all traffic that "in all of these instances the Nashville rate yields the greatest earnings;" and that the defendants had sought "in elaborate detail" to analyze these comparisons and show that none was of any value in determining the reasonableness of the rates in issue. The report, however, as explicitly stated, did not attempt to set forth the detail into which the parties went in support of their contentions as to the conclusions that might be properly drawn from these exhibits, but stated, generally, that ton-mile statistics are far from infallible guides in fixing freight rates; that per-car earnings, with distance considered, are much more reliable, and that when the commodity moves in train-loads the earnings per train mile furnish the best criterion; that comparison of any kind, however, to be effective must be analogous, or nearly so, the rate charged or gross earnings derived for the transportation of a given commodity between two points furnishing a guide in arriving at the rate to be charged upon the same or nearly the same commodity between two other points similarly situated; that the comparisons made with coal moving to the lakes for transshipment, to tidewater and between points in central freight association territory were of little value because of the manifest difference in transportation conditions; and that as Chattanooga, Knoxville and East St. Louis had coal mines in their immediate vicinities, such juxtaposition of supply and market necessarily exercised a material influence over the rates from more distant mines, thereby lessening the strength of the comparison. (28 I. C. C. at p. 535.) The report then set forth, among other things, the following facts: That on steam coal the \$1.00 per ton rate to Nashville from the Western Kentucky mines on the Louisville & Nashville Railroad had been in effect since 1888, having remained unchanged for 25 years; that the capacity of coal cars used by the Louisville & Nashville Railroad in hauling from these mines to Nashville had in the meantime increased from 16 to 41 tons; that the tractive power of engines had also increased; so that instead of 660 gross tons handled between Guthrie, an intermediate point, and Nashville, in 1888, 1,165 gross tons were then handled, this being significant as tending to reduce the operating cost per unit of freight transported, although the hauling of coal train loads into Nashville appeared to be the exception rather than the rule; that the volume of the tonnage had also increased from 193,000 tons

handled in 1892 to nearly 450,000 tons in 1911; that little more than a suggestion appeared of record as to increased cost of labor and material, and that no attempt had been made to show operating costs; that the Nashville rate from the Western Kentucky mines produced a ton-mile revenue of 9.2 mills for an average haul of 108.5 miles; that the Louisville & Nashville Railroad also hauled coal from these same Western Kentucky mines to Memphis, an average distance of 276 miles, for a rate of \$1.10, yielding a per-ton mile revenue of slightly less than 4 mills; that the routes from these mines to Memphis and to Nashville were identical as far as Guthrie, Kentucky, a point 216 miles distant from Memphis and 49 miles from Nashville, where the routes diverged, or, "in other words, the Louisville & Nashville charges only \$1.10 per ton more when the additional haul beyond Guthrie is 276 (216) miles to Memphis than when it is 49 miles to Nashville;" that while the movement of coal to Memphis may be somewhat heavier than to Nashville, there was nothing of record to indicate any substantial dissimilarity in operating conditions from these mines to either market; that the defendants had not undertaken to show any material difference in transportation conditions, but relied entirely upon their contention that the Memphis rate was dictated by water transportation down the Mississippi River from the Pittsburgh mines; that the history of the Memphis rate, which is set out in the report, did not support the theory that it was fixed by water competition, and that, on the whole, the Commission was unable to find any substantial dissimilarity attaching to the transportation of coal from Western Kentucky mines on the Louisville & Nashville Railroad to Memphis and to Nashville, except distance, which was greatly in favor of Nashville; that prior to June, 1913, the Louisville & Nashville Railroad had charged a rate of 60 cents for an average haul of 142 miles, in connection with the Louisville, Henderson & St. Louis Railroad, from these Western Kentucky mines to Louisville, and the Illinois Central Railroad had also charged the same rate for an average haul of 125 miles from these same mines to Louisville, such rate having been, however, advanced to 65 cents subsequent to the submission of the case; that the comparison with this rate was opposed by the defendants on the ground of water competition to Louisville from Pittsburgh and West Virginia mines; that the Commission found, however, the rail-carrier competition was the factor of prime consideration; that the conditions at Louisville were quite similar to those at Memphis, and at neither could they be said substantially to differ from those at Nashville; that while the Commission

did not think a relationship in the matter of coal rates between these three cities should be established, a comparison of their rates properly might be drawn, giving some consideration to the fact that coal was actually moving in considerable quantities by water to Louisville, but not permitting it to vitiate the effect of the comparison; that measured by the rates to Memphis and to Louisville, the rate to Nashville was high; that the average loading of cars from the mines in question was 41 tons on the Louisville & Nashville Railroad and 34.5 tons on the Nashville & Chattanooga Railway, the \$1.00 rate producing a car revenue of \$41.00 in one instance and \$34.50 in the other, or per car mile earnings of 37.78 cents and 24.64 cents, respectively; that even if returned empty the car mile revenue for the loaded and empty movement was 18.89 cents and 12.32 cents, respectively, while the average loaded and empty car mile revenue for all traffic during 1912 was 10.54 cents for the Louisville & Nashville Railroad, 10.08 for the Nashville & Chattanooga Railway, 7.777 cents for the Illinois Central Railroad, and 16.425 cents for the Tennessee Central Railroad; and that the average distance from the mines on the Illinois Central Railroad in the same Western Kentucky fields to Nashville was 167 miles, the coal reaching Nashville over the Tennessee Central Railroad, the rate thereon producing, if loaded at 40 tons per car, a revenue of \$40.00 per car, and earnings per loaded car mile of 24 cents, or 12 cents per car mile for the loaded and empty movement, while 34.5 tons to the car would produce a loaded car mile rate of 20.65 cents, or 10.325 cents per mile loaded and empty. (28 I. C. C., pp. 536-540.)

After setting forth the foregoing facts, the report then states the conclusion of the Commission, as follows: "As to the Louisville & Nashville, we are of opinion and find that the existing rate on coal to Nashville from Western Kentucky mines on its Owensboro and its Henderson divisions is unreasonable. We are of the same opinion and similarly find as to the Nashville, Chattanooga & St. Louis rate from its Tennessee and Alabama mines to Nashville. We further find that reasonable rates to Nashville from the Louisville & Nashville Western Kentucky mines on its Owensboro and its Henderson divisions should not exceed 80 cents per ton, and from the Nashville, Chattanooga & St. Louis mines in Alabama and Tennessee, the movement from which is through Alabama, 90 cents per ton." (28 I. C. C., at p. 540.)

It is earnestly contended by the petitioners that the various evidential facts set forth and found in the report of the Commission, which have been summarized hereinabove, do not, as a matter of law, support its ultimate finding or conclusion, above set forth, as to the unreasonableness of the old rates and the reasonableness of the new rates required, and hence, the order of the Commission, based on such erroneous conclusion, is invalid.

This contention obviously involves, in the first place, as its underlying logical foundation, the assumption that the Commission has undertaken to set forth in its report all the evidential facts leading to its ultimate conclusion as to the unreasonableness or reasonableness of such rates, respectively. However, the report affirmatively shows, upon its face, that the Commission did not undertake to set forth the details of the "innumerable exhibits" introduced by the complainant, bearing on the question of the comparison of rates; nor does it recite that the Commission had otherwise undertaken to set forth or find all the facts established by the evidence. It is to be noted in this connection that by Section 14 of the Act to Regulate Commerce the report is only required "to state the conclusions of the Commission, together with its decision, order or requirements in the premises," the supplemental provision that the report shall include the findings of fact on which an award is made only applying in case damages are awarded. And in the present case the Commission, after setting forth certain evidential facts, but without purporting to make a complete or detailed finding in regard thereto, stated, in substance, as above set forth, that it "found" as its ultimate conclusion, that the old rates were unreasonable and that the new rates which it required were reasonable.

But even if the report of the Commission had undertaken to set forth and find all of the evidential facts upon which its ultimate finding or conclusion was based, we are of opinion that its ultimate finding or conclusion of fact as to the reasonableness or unreasonableness of the rates in question does not, upon the evidential facts found, necessarily involve an error of law rendering it invalid.

It is true that if, upon the facts found by the Commission, its conclusion therefrom plainly involves an error of law, as where it rests, under the undisputed facts, upon an erroneous construction of the Act to Regulate Commerce, an order made



by the Commission, based upon such error of law, is subject to judicial review. *Illinois Railroad vs. Interstate Commission*, 206 U. S., 441, 457; *Interstate Commission vs. Northern Pacific Railway*, 216 U. S., 531, 545; *United States vs. Baltimore Railroad*, 226 U. S., 14, 18; *Tap Line Cases*, 234 U. S., 1, 26; *Los Angeles Switching Case*, 234 U. S., 294, 309; *Louisiana Railway vs. United States* (Com. Ct.), 209 Fed., 244. And see *Denver Railroad vs. Arizona Railroad*, 233 U. S., 601, 602, 603, as to a ruling of law imported from a general conclusion of facts.

Obviously, however, this rule does not authorize the Court to review, as involving an error of law, the conclusion of the Commission upon a question of fact as to the reasonableness or unreasonableness of a given rate, depending upon a consideration of the weight to be given the various evidential facts found by it. The Court cannot review the conclusion of the Commission on questions of fact, or substitute its judgment for that of the Commission upon matters of fact within the Commission's province. *Interstate Commission vs. Delaware Railroad*, 220 U. S., 235, 251; *Los Angeles Switching Case* (U. S.), *sup.*, at p. 314. The question of the reasonableness of a rate is, however, one of fact. *Illinois Railroad vs. Interstate Commission* (U. S.), *sup.* at p. 455. And, accordingly, it is well settled that where all the evidence introduced before the Commission is exhibited to the Court, its conclusion of fact that a given rate is reasonable or unreasonable, will be accepted by the Court as final and not reviewed upon the weight of the evidence, unless either there is no substantial evidence supporting such conclusion, or such conclusion is contrary to the indisputable character of the evidence; in which case the conclusion involves an error of law and is therefore reviewable by the Court. *Interstate Commission vs. Union Pacific Railroad*, 222 U. S., 541, 547, 548; *Interstate Commission vs. Louisville Railroad*, 227 U. S., 88, 91, 92, 100; *Florida Line vs. United States*, 234 U. S., 167, 185.

It necessarily follows that where the party complaining of an order made by the Commission does not exhibit to the Court the evidence taken before the Commission, but in lieu thereof, insists that the evidential facts found by the Commission are insufficient to support its conclusion as to the reasonableness or unreasonableness of a given rate, such conclusion of the Commission should be accepted by the Court as final and not reviewable upon the evidential weight of such facts,



unless it appears, not only that the Commission undertook to embody in such findings all the material facts established by the evidence, but, in addition, either that the evidential facts so found furnish no substantial support to such conclusion, or that such conclusion is contrary to the indisputable character of such evidential facts, in which cases the conclusions would involve an error of law reviewable by the Court.

Furthermore, in determining whether the conclusion of the Commission is supported by substantial evidence, the Court does not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling; and it ascribes to the findings of the Commission, which are made by law *prima facie* true, "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Interstate Commission vs. Union Pacific Railroad* (U. S.), *sup.* at p. 547. Nor does the validity of an order made by the Commission depend upon the correctness of each of its separate findings, as indispensable links in the chain of proof upon which it is based, where the rulings may still be sustained although some of the collateral findings, which, if correct, would be confirmatory thereof, are eliminated; the question being "whether there was substantial evidence to support the order." *Interstate Commission vs. Louisville Railroad* (U. S.), *sup.* at p. 98. And in rate-making cases the weight to be given evidence relating to rates which the carrier insists had been enforced by competition, is peculiarly a matter for the Commission, "a body experienced in such matters and familiar with the complexities, intricacies and history of the rate making in each section of the country." (*Ib.*) And even the *prima facie* evidential effect of testimony may be sufficient to support the order of a rate-making Commission. *Louisville Railroad vs. Kentucky Commission* (W. D. Ky.), 214 Fed., 464, 469. And, in general, as the matter of fixing reasonable rates has been committed to the Commission, the courts which have not been vested with any such power cannot interfere with the rates fixed by the Commission, "unless it is plainly made to appear that those ordered are void." *Atchison Railway vs. United States*, 232 U. S., 199, 221. Like considerations must necessarily govern in determining the effect of evidential facts found by the Commission as substantially supporting its conclusion.

Without determining the weight to be given to the many evidential facts set forth in the report of the Commission, when separately considered, as, for example, the extent, if any, to

which water or rail competition at Memphis, or Louisville, may properly affect the weight to be given to the rates to such points as a basis for comparison, we are of opinion, after careful consideration, in the light of the foregoing principles, that, even aside from the fact that the Commission does not appear to have undertaken to set forth in its report all the evidential facts upon which its conclusion as to the unreasonableness of the old rates and the reasonableness of the new rates were based, the evidential facts which it did set forth in its report, when considered as a whole, afford substantial support to its conclusion in this matter; and that such conclusion is not contrary to the indisputable character of such evidential facts, and does not necessarily involve any dominating error of law, but merely a determination of the precise evidential weight of such facts, a matter which, there being substantial evidence in support of its conclusion, is entirely within the province of the Commission, and as to which the judgment of the Court cannot be substituted. It results that the conclusions of the Commission as to the unreasonableness and reasonableness of the old and new rates, respectively, must now be accepted by the Court as final, and that the rate order in question cannot be properly enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission.

And the old rates having been determined to be unreasonable and the new rates required to be reasonable, it necessarily follows that the Commission had jurisdiction, under the express provision of Section 15 of the Act to Regulate Commerce, to make the order as to rates complained of.

There is furthermore no substantial evidence that the new rates prescribed by the order of the Commission are so low as to be confiscatory and in violation of the constitutional provision against taking property without due process of law. *Interstate Commission vs. Union Pacific Railroad* (U. S.), *sup.* at p. 547; *Louisville Railroad vs. Siler* (C. C.), 186 Fed., 176, 189. And this is, in effect, conceded in petitioners' brief.

So much of the motion for an interlocutory injunction as relates to the order of the Commission in reference to the rates to be charged by the petitioners for the interstate transportation of coal to Nashville must hence be denied.

*Order as to switching practices.* The Commission, in its report, set forth the following facts in reference to the Nash-

ville switching situation: That the Louisville & Nashville Terminal Company is a corporation whose entire capital stock is owned by the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway; that the Louisville & Nashville Railroad owns more than 79 per cent of the capital stock of the Nashville & Chattanooga Railway; that the Terminal Company owns terminal stations at Nashville, with 1.07 miles of main line and 30.32 miles of sidings; that in 1896 the Terminal Company leased all of its property to the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway jointly for 999 years, at an annual rental of 4 per cent upon the cost, the amount to be paid by each lessee being determined on the basis of use, and the operating expenses of such properties being prorated upon the same basis; that both the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway also individually own tracks which they operate independently of each other or of the Terminal Company, and upon which industries are located; that traffic of all kinds is freely interchanged by the Louisville & Nashville Railroad and Nashville & Chattanooga Railway to and from these industries as well as to and from those on the rails of the Terminal Company; that the tariffs of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway provide that no charge will be made for switching between their respective lines at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic; that prior to 1907 neither of these railroads would switch freight of any kind to or from the Tennessee Central Railroad, but in that year, in deference to public opinion, they began switching all non-competitive traffic, *except coal*, to and from the Tennessee Central Railroad, at a charge for this service of \$3 per car; that under this restricted practice no coal had been interswitched between the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway on the one hand, and the Tennessee Central Railroad on the other; that, although neither the Louisville & Nashville Railroad nor the Nashville & Chattanooga Railway had ever even considered the switching of coal from the Tennessee Central Railroad, it developed at the hearing that the Nashville & Chattanooga Railway did have an effective rate applicable to interchange with the Tennessee Central Railroad, under which such movement could have been accomplished for 60 cents a ton, which rate, however, was cancelled shortly after the hearing; that while the switching tariff of the Tennessee Central Railroad was similar to those of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway,

its refusal to switch the coal from either of the other lines was in reality a retaliatory measure, and it had, as a cross-complainant, favored the prayer of the complaint; that there was little doubt as to the competitive character of the traffic in coal; and, in short, that the "joint and the separately owned terminals of each of these two defendants are open to all of the traffic of the other; are open to all non-competitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate." (28 I. C. C., pp. 540-542.)

After setting forth the foregoing facts and the contentions of the respective parties, the report states the conclusion of the Commission as follows: "Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other." (28 I. C. C., at p. 542.)

The order issued by the Commission in accordance with these findings, which is hereinabove set out, provided, in effect, that the petitioners should for not less than two years abstain from their then practice with respect to interswitching car load shipments of coal at Nashville, and should establish and maintain the same practice in respect to switching such shipments to and from the tracks of the Tennessee Central Railroad as they might contemporaneously maintain with respect to similar shipments to and from their own respective tracks.

The determination whether in particular instances there has been an undue or unreasonable prejudice or preference is a question of fact. *Interstate Commission vs. Alabama Railway*, 168 U. S., 144, 170. It necessarily follows that the Court in determining whether the conclusions of the Commission as to the discriminatory and preferential practices is supported by the evidential facts set forth in the report, is to be governed by the same considerations as those hereinabove set forth in reference to its conclusion as to the reasonableness or unreason-

ableness of rates. And, as in the case of rates prescribed by the Commission, the Court cannot interfere with practices established by it, "unless it is made plainly to appear that those ordered are void." *Atchison Railway* (U. S.), *sup.* at p. 221.

After careful consideration of the evidential facts set forth in the report of the Commission in reference to the switching practice of the petitioners at Nashville, without determining the weight given to such facts, when separately considered, we are of opinion that such facts, when considered as a whole, afford substantial evidence supporting the conclusion of the Commission that such switching practice, which in effect prohibited the interswitching of coal to and from the tracks of the Tennessee Central Railroad, was unreasonable and unjustly discriminatory, that it unjustly discriminated against shipments of coal from the Tennessee Central Railroad, and unjustly preferred such shipments from the lines of each other, and that a just and reasonable practice would permit the interswitching of coal from the lines of each of these carriers to industries on the rails of the others; and that such conclusion is not contrary to the indisputable character of the evidential facts set forth, and does not involve, in the determination of their weight, any dominating error of law. And in this connection we are of the opinion that the case of *United States vs. St. Louis Terminal*, 224 U. S., 383, to which the Commission refers in its report, although arising under the Anti-Trust Act, throws, by analogy, a persuasive light upon the discriminatory and preferential character of the practices in question.

It results that the conclusion of the Commission in the matter of the switching practice must now be accepted by the Court as final, without substituting its own judgment therefor on the weight of the evidence, and hence that the order in question cannot be properly enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission.

And the practice of the petitioners having been determined to be unreasonable and unjustly discriminatory, and the new practice required to be just and reasonable, it follows, in our opinion, that the Commission had jurisdiction under the express provisions of the Act to Regulate Commerce to make the order as to switching practices complained of. By Section 3 of the Act it is made unlawful for any common carrier to give any undue or unreasonable preference or advantage to any par-

ticular person, locality or particular description of traffic, in any respect whatsoever, or to subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it is provided that all common carriers "shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in the rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks and terminal facilities to any other carrier engaged in like business." And by Section 15 of the Act it is provided that if the Commission, after hearing, shall be of the opinion that any rates, charges, regulations or practices whatsoever of any carrier, are "unjust and unreasonable, or unjustly discriminatory, or unduly preferential," it is authorized and empowered to prescribe the just and reasonable rates or charges to be thereafter observed, and the just, fair and reasonable regulation or practice to be thereafter followed, and to order the carrier to desist from such violation.

It is not contended that the order in question requires the petitioners to allow the Tennessee Central Railroad the physical occupancy or use of their tracks or terminal facilities by running its trains or locomotives thereon for the delivery of coal destined to industries along their lines; and obviously its only effect is to require the petitioners to receive cars of coal from the Tennessee Central Railroad at junction points, and switch and deliver the same to industries along their respective lines in like manner as they receive such cars from one another to switch and deliver the same, upon a just, reasonable and non-prohibitive switching charge, which they may themselves establish, but which shall be the same as they shall respectively make to one another.

We think it clear that this order does not require the petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad, within the meaning of the proviso contained in Section 3 of the Act to Regulate Commerce, or constitute an appropriation of such tracks and terminals for the use of the Tennessee Central Railroad, but that it is merely a regulation of the business of the petitioners in the interchange of traffic, within the express authority conferred by the Act. *Pennsylvania Company vs. United States*

(W. D. Penn.), — Fed., — (May 9, 1914). This question is, in our opinion, ruled by the opinion in *Grand Trunk Railway vs. Michigan Commission*, 231 U. S., 457, 468, involving the construction of a Michigan statute similar in its essential respects to the provisions of the Act to Regulate Commerce. Nor is this conclusion at variance with the case of *Louisville Railroad vs. Stockyards*, 212 U. S., 132, 145, which involved the entirely different question of the right to compel a carrier to accept cars "offered to it at arbitrary points near its terminus for the purpose of reaching and using its terminal station." Neither do we find any irreconcilable conflict between the opinion of the Commission in the instant case and that in *Waverly Works vs. Pennsylvania Railroad*, 28 I. C. C., 621.

There is furthermore no evidence that the switching practices prescribed will violate the constitutional provision against taking property without due process of law. See *Grand Trunk Railway vs. Michigan Commission* (U. S.), *sup.*, at p. 468. And it may well be assumed that the petitioners will not themselves establish a switching charge so low as to be confiscatory.

It results that so much of the order of the Commission as relates to switching practices cannot be now enjoined.

An order will accordingly be entered denying the petitioners' motion for an interlocutory injunction.

J. W. WARRINGTON,  
*Circuit Judge, Sixth Cir. U. S.*

JNO. E. MCCALL,  
*U. S. District Judge.*

EDWARD T. SANFORD,  
*U. S. District Judge.*

Above *per curiam* opinion of the Court endorsed:

Filed 8 A. M. Sept. 1, 1914.

H. M. DOAK, *Clerk.*

By N. T. ARNETT, *D. C.*

On the 12th day of February, 1914, the following order establishing Court, denying motion for stay and granting leave for petitioners to file brief, etc., was entered in Book A, page 51, to-wit:

IN THE UNITED STATES DISTRICT COURT, MID-  
DLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY  
COMPANY  
vs.

UNITED STATES and INTERSTATE COMMERCE COM-  
MISSION.

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In Equity. No. 21.

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The petitioners on February —, 1914, having filed their petition herein to enjoin the order of the Interstate Commerce Commission in *Traffic Bureau of Nashville vs. Louisville & Nashville Railroad Company et al.*, Commission's Docket No. 4604, and having on February 4, 1914, served notice of motion for interlocutory injunction; and having made application to the Honorable E. T. Sanford, Judge of the District Court of the United States for the Middle District of Tennessee, for an early hearing thereon, he thereupon immediately called to his assistance to hear and determine the application the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable John E. McCall, Judge of the District Court of the United States for the Western District of Tennessee;

And thereupon the said three Judges convened the United States District Court for the Middle District of Tennessee, at Nashville, Tennessee, on Tuesday, February 10, 1914, at ten o'clock A. M., in pursuance of the statute in such case made and provided, all of the parties being present and represented by their respective counsel.



And thereupon the said cause came on for hearing on the motion of the petitioners for a temporary stay or suspension of sixty days, or until the determination of the motion for an interlocutory injunction, in whole, of the said order of the Interstate Commerce Commission, and the same was argued by counsel and submitted to the Court:

On consideration whereof, it is ordered that the said motion be, and the same is hereby, denied.

And thereupon the said cause came on further to be heard on the application of the petitioners for an interlocutory injunction against the said order of the Interstate Commerce Commission, and all of the parties respondent having stated in open Court that they challenged the sufficiency of the notice given in the case, but they waived their exceptions to said notice for the purpose that this application be heard on its merits, and the said application was argued by counsel and submitted to the Court, and taken under advisement.

Leave was granted the petitioners to file briefs with the Clerk within fifteen (15) days from the date hereof, and the respondents were allowed ten (10) days thereafter to answer the same, with five (5) days thereafter to the petitioners to reply.

February 12, 1914. Approved for entry.

SANFORD, J.

Approved:

WILLIAM A. COLSTON,  
*For the Petitioners.*

A. M. TILLMAN,  
BLACKBURN ESTERLINE,  
*For the United States.*

CHAS. W. NEEDHAM,  
*For the Interstate Commerce Commission.*

Above order endorsed:

Entered Book A, page 51.

On the 10th day of February, 1914, the following order of the Court was entered in Equity Journal, Book A, page 50, to-wit:

IN THE UNITED STATES DISTRICT COURT, MID-  
DLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

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In Equity. No. 21.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
Et Al.,

vs.

UNITED STATES OF AMERICA.

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ORDER.

This day this cause came on to be heard on the motion of the petitioners for a temporary stay or suspension for sixty days, or until the determination of the motion for preliminary injunction, in whole of the order of the Interstate Commerce Commission entered December 9, 1913, effective February 15, 1914, in *Traffic Bureau of Nashville vs. Louisville & Nashville Railroad Company et al.*, Docket No. 4604, and the same was argued by counsel and submitted to the Court:

On consideration thereof it is ordered that the said motion be, and the same is hereby, denied.

Above order engrossed:

Entered Equity Journal, Vol. A, p. 50.

J. W. WARRINGTON,  
*United States Circuit Judge.*

JNO. E. MCCALL,  
*United States District Judge.*

EDWARD T. SANFORD,  
*United States District Judge.*

On September 8, 1914, the following order of the Court was entered in Equity Journal A, page 77, to-wit:

---

IN THE UNITED STATES DISTRICT COURT, MID-  
DLE DISTRICT OF TENNESSEE, NASH-  
VILLE DIVISION.

---

In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
Et Al.,

vs.

THE UNITED STATES OF AMERICA, Et Al.

---

This cause came on to be further heard at this term on the motion of the petitioners for an interlocutory injunction restraining the enforcement of the orders of the Interstate Commerce Commission complained of herein, *pendente lite*, and was heard before and submitted to the Court, consisting of the Honorable John W. Warrington, Circuit Judge; the Honorable John E. McCall, District Judge, and the Honorable Edward T. Sanford, District Judge, sitting pursuant to the Urgency Deficiency Act of October 22, 1913, and was heard upon the petition, the answers and the further showing made by the petitioners by affidavit, and argument of counsel; and thereupon, upon consideration thereof, the Court having handed down its *per curiam* opinion thereon, it is, in accordance with said opinion, ordered that the petitioners' motion for an interlocutory injunction herein, be, and the same is, hereby denied.

Approved for entry.

SANFORD, District Judge.

Above order endorsed.

Ent. Journal "A," page 77, September 8, 1914.

Received September 1, 1914.

On September 18, 1914, the following petition for appeal was filed, to-wit:

---

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

---

In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY  
*Petitioners,*  
vs.

UNITED STATES OF AMERICA, *Respondent,*  
and  
INTERSTATE COMMERCE COMMISSION,  
CITY OF NASHVILLE, TENNESSEE,  
DAVIDSON COUNTY, TENNESSEE, and  
TRAFFIC BUREAU OF NASHVILLE, TENNESSEE,  
*Intervening Respondents.*

Petition for appeal filed on the 18th day of September, A.D., 1914, in the District Court of the United States for the Middle District of Tennessee, Nashville, Division.

---

The above named petitioners, Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, conceiving themselves aggrieved by the decree made (after notice and hearing, as provided in an Act entitled "An Act Making Appropriations to Supply Urgent Deficiencies in

Appropriations for the Fiscal Year Nineteen Hundred and Thirteen, and for other purposes," H. R. 7898) on the first day of September, A.D., 1914, in the above entitled cause, and, pursuant to the provision of said Urgent Deficiency Act, approved October 22, 1913, relating to appeals to the Supreme Court of the United States from orders granting or denying interlocutory injunctions, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree were so made, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY L. STONE,  
W. A. COLSTON,  
W. A. NORTHCUTT,  
JOHN B. KEEBLE,  
CLAUDE WALLER,  
*Solicitors for Petitioners.*

NASHVILLE, TENN., Sept. —, 1914.

And now, to-wit: On September —, 1914, it is ordered that the appeal be allowed as prayed for.

EDWARD T. SANFORD,  
*District Judge.*

Above petition for appeal and order under one cover endorsed.

Filed September 18, 1914.

H. M. DOAK, *Clerk.*

On September 18, 1914, the following Assignment of Errors to the Supreme Court of the United States was filed, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

---

In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY,

*Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent,*  
and

INTERSTATE COMMERCE COMMISSION,  
CITY OF NASHVILLE, TENNESSEE,  
DAVIDSON COUNTY, TENNESSEE, and  
TRAFFIC BUREAU OF NASHVILLE, TENNESSEE,

*Intervening Respondents.*

---

ASSIGNMENT OF ERRORS ON APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES.

---

And now, on this, the — day of September, A.D., 1914, come the petitioners by their solicitors, Henry L. Stone, W. A. Colston, W. A. Northcutt, John B. Keeble and Claude Waller, and say that the decree entered in the above cause on the first day of September, A.D., 1914, is erroneous and unjust to petitioners, and assign for errors:

1. That the Court erred in denying the restraining order heretofore applied for.

2. That the Court erred in denying the motion for an interlocutory injunction.

3. That the Court erred in holding that so much of the motion for an interlocutory injunction as relates to the order of the Commission in reference to the rates to be charged by petitioners for the interstate transportation of coal to Nashville must be denied.

4. That the Court erred in holding that so much of the order of the Commission as relates to switching practices could not be enjoined.

5. That the Court erred in holding that the Commission's ultimate finding or conclusion of fact as to the reasonableness or unreasonableness of the rates in question does not, upon the evidential facts found, necessarily involve an error of law, rendering it invalid.

6. That the Court erred in holding that a conclusion of the Commission as to the reasonableness or unreasonableness of a given rate depending upon the various evidential facts found by it is not subject to judicial review.

7. That the Court erred in holding that where the party complaining of an order made by the Commission does not exhibit to the Court the evidence taken before the Commission, but in lieu thereof, insists that the evidential facts found by the Commission are insufficient to support its conclusions as to the reasonableness or unreasonableness of a given rate, such conclusion of the Commission should be accepted by the Court as final and not reviewable upon the evidential weight of such facts, unless it appears, not only that the Commission undertook to embody in such findings all the material facts established by the evidence, but, in addition, either that the evidential facts so found furnish no substantial support to such conclusion, or that such conclusion is contrary to the indisputable character of such evidential facts.

8. That the Court erred in holding that "even aside from the fact that the Commission does not appear to have undertaken to set forth in its report all the evidential facts upon which its conclusion as to the unreasonableness of the old rates and the reasonableness of the new rate were based, the evidential facts which it did set forth in its report, when considered as a whole, afford substantial support to its conclusion in this

matter; and that such conclusion is not contrary to the indisputable character of such evidential facts and does not necessarily involve any dominating error of law, but merely a determination of the precise evidential weight of such facts, a matter which, there being substantial evidence in support of its conclusion, is entirely within the province of the Commission, and as to which the judgment of the Court cannot be substituted. It results that the conclusion of the Commission as to the unreasonableness and reasonableness of the old and new rates, respectively, must now be accepted by the Court as final, and that the rate order in question cannot be properly enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission."

9. That the Court erred in holding that the Commission had jurisdiction to make the order as to rates complained of.

10. That the Court erred in holding that a finding or conclusion of the Commission as to an undue or unreasonable prejudice or preference is a question of fact not subject to judicial review.

11. That the Court erred in holding that the evidential facts set forth in the report of the Commission in reference to the switching practice of the petitioners at Nashville afford substantial evidence supporting the conclusion of the Commission that such switching practice "was unreasonably and unjustly discriminatory, that it unjustly discriminated against shipments of coal from the Tennessee Central Railroad and unjustly preferred such shipments from the lines of each other, and that a just and reasonable practice would permit the inter-switching of coal from the lines of each of these carriers to industries on the rails of the others"; and that such conclusion does not involve any dominating error of law.

12. That the Court erred in holding that the conclusion of the Commission in the matter of the switching practice must be accepted by the Court as final and that the order in question cannot be enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission.

13. That the Court erred in holding that the Commission had jurisdiction to make the order as to switching practices complained of.



14. That the Court erred in holding that the order as to switching practices does not require petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad within the meaning of the proviso contained in Section 3 of the Act to Regulate Commerce.

15. That the Court erred in holding that there is no evidence that the switching practices complained of will violate the constitutional prohibition against taking property without due process of law.

16. That the Court erred in not holding that the orders of the Commission, both with respect to the rates complained of and with respect to the switching practices complained of, were beyond the limits of the powers delegated to the Commission by Acts of Congress.

17. That the Court erred in holding that said orders of the Commission, even if in form within its delegated powers, are the result of so unreasonable an exercise of such power that they are in substance beyond it.

18. That the Court erred in not holding that the Commission, in making said orders, acted in a capricious and unreasonable manner.

19. That the Court erred in not holding that the facts found by the Commission do not as a matter of law support said orders made by it.

20. That the Court erred in not holding that the Commission was without jurisdiction to make said orders.

21. That the Court erred in not holding that the enforcement of said orders will result in the taking of petitioners' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

22. That the Court erred in not granting the relief prayed for.

*Wherefore* the petitioners pray that the said decree be reversed, and that the District Court be instructed to enter a decree enjoining, setting aside and annulling the orders of the Interstate Commerce Commission, complained of, and that said

District Court be instructed to grant petitioners a preliminary injunction restraining *pendente lite* the enforcement of said orders of the Interstate Commerce Commission.

HENRY L. STONE,  
W. A. COLSTON,  
W. A. NORTHCUTT,  
JOHN B. KEEBLE,  
CLAUDE WALLER,  
*Solicitors for Petitioners.*

Above assignment of errors endorsed.

Filed September 18, 1914.

H. M. DOAK, *Clerk.*

On September 18, 1914, the following praecipe and service of copies acknowledged, etc., was filed, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

---

In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
and  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY, .

*Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

and

INTERSTATE COMMERCE COMMISSION,  
CITY OF NASHVILLE, TENNESSEE,  
DAVIDSON COUNTY, TENNESSEE, and  
TRAFFIC BUREAU OF NASHVILLE, TENNESSEE,  
*Intervening Respondents.*

---

PRAECIPE.

---

The Clerk will copy—

1. The petition, together with exhibits A, B and C, but not exhibit E; the report and orders of the Interstate Commerce Commission filed as exhibit E being shown as exhibit A in the answer of the Interstate Commerce Commission.
2. The answer of the respondent, United States of America.
3. The answer of the Interstate Commerce Commission, with exhibit A.

4. The answer of the Intervening Respondents, City of Nashville, Tennessee, Davidson County, Tennessee, and Traffic Bureau of Nashville, Tennessee.

5. The petition of the City of Nashville, Tennessee, Davidson County, Tennessee, and Traffic Bureau of Nashville, Tennessee, to be made co-defendants.

6. The order of intervention making the City of Nashville, Davidson County, and Traffic Bureau of Nashville, Intervening Respondents.

7. The affidavits of Geo. W. Lamb and C. B. Compton, filed by petitioners upon motion for temporary injunction, including in the affidavit of Geo. W. Lamb the statement showing results of operation of the Louisville & Nashville Railroad Company during the thirty-three years from July 1, 1878, to June 30, 1911, inclusive, but omitting from both affidavits the purely formal parts, to-wit: the captions and the *jurats*.

8. The decree and minute, to-wit: of February 10, 1914, denying motion for temporary stay, and noting waiver of exceptions to notice.

9. The petition for an appeal.

10. The order granting an appeal.

11. The assignment of errors.

12. And this praecipe.

Statement of evidence to be included in the record on appeal.

In addition to the evidence which appears in the pleadings and the orders of Court, set forth in the praecipe, the evidence will consist of the affidavits of Geo. W. Lamb and C. B. Compton, omitting merely formal parts, as set forth in paragraph 7 of the praecipe.

HENRY L. STONE,  
W. A. COLSTON,  
W. A. NORTHCUTT,  
JOHN B. KEEBLE,  
CLAUDE WALLER,  
*Solicitors for Petitioners.*

Service of copies of this praecipe, statement of evidence, of petition for appeal, and of assignment of errors is hereby acknowledged this 14th day of September, 1914.

BLACKBURN ESTERLINE,

*For the Attorney-General of the United States of America.*

Service of copies of this praecipe, statement of evidence, of petition for appeal, and of assignment of errors is hereby acknowledged this 12th day of September, 1914.

CHAS. W. NEEDHAM,

*Solicitor for the Interstate Commerce Commission.*

Service of copies of this praecipe, statement of evidence, of petition for appeal, and of assignment of errors is hereby acknowledge this 11th day of September, 1914.

F. M. GARARD,

*Solicitor for the City of Nashville, Tennessee.*

Service of copies of this praecipe, statement of evidence, of petition for appeal, and of assignment of errors is hereby acknowledged this 11th day of September, 1914.

T. J. McMORROUGH,

*Solicitor for Davidson County, Tennessee.*

STATE OF TENNESSEE,

DAVIDSON COUNTY.

On this, 11th day of September, A.D., 1914, personally appeared before the undersigned authority, A. W. Stockell, Jr., who being duly sworn, makes oath that he is a duly practicing solicitor of the United States District Court at Nashville, Tennessee; that he served a copy of the above praecipe, statement of evidence, petition for appeal and assignment of errors upon the Traffic Bureau of Nashville, Tennessee, by delivering a copy of same to T. M. Henderson, Commissioner Traffic Bureau of Nashville, Tennessee.

A. W. STOCKELL, JR.

Sworn to and subscribed before me, this September 11, 1914.

E. B. DUVAL,

*Notary Public.*

(SEAL)

Above praecipe and acknowledgment of service, etc., endorsed.

Filed September 18, 1914.

H. M. DOAK, *Clerk.*

On September 23, 1914, the following citation was signed, and the same was filed on September 24, 1914, to-wit:

---

UNITED STATES OF AMERICA.

---

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

---

TO THE UNITED STATES OF AMERICA,  
INTERSTATE COMMERCE COMMISSION,  
CITY OF NASHVILLE, TENNESSEE,  
DAVIDSON COUNTY, TENNESSEE,  
TRAFFIC BUREAU OF NASHVILLE, TENNESSEE.

*Greeting:* You are cited and admonished to be and appear before the Supreme Court of the United States to be holden in the City of Washington, D. C., on the 23d day of October, 1914, pursuant to an appeal allowed by the District Court of the United States for the Middle District of Tennessee, Nashville Division, wherein the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, petitioners in said cause, are appellants, and you are appellees; to show cause, if any there be, why the decree rendered against the said appellants in the said appeal mentioned should not be corrected, and why speedy justice should not be done in the premises.

*Witness* the Honorable Edward D. White, Chief Justice of the United States, this the 23d day of September in the year of our Lord, One Thousand Nine Hundred and Fourteen, and the Independence of the United States of America the One Hundred and Thirty-eighth.

EDWARD T. SANFORD, *Judge.*

Endorsed:

Signed September 23, 1914, and filed September 24, 1914.

H. M. DOAK, *Clerk.*

Acknowledgment of service:

Services of the within citation acknowledged for City of  
Nashville by F. M. GARARD,  
Sept. 25, 1914. *Assistant City Attorney.*

Acknowledgments and returns on certified copies:

Service accepted October 1, 1914.  
J. W. FOLK,  
*For Interstate Commerce Commision.*

Filed October 3, 1914. H. M. DOAK, *Clerk.*

Service accepted October 1, 1914.  
BLACKBURN ESTERLINE,  
*For the United States of America.*

Filed October 3, 1914. H. M. DOAK, *Clerk.*

Within writ came to hand September 26 and executed October 3, 1914, on the Traffic Bureau of Nashville by reading to and delivering a copy of this writ to C. S. Martin, President, and upon Davidson County by reading to and delivering a copy to W. M. Pollard, County Judge.

JOHN W. OVERALL,  
*United States Marshal.*  
By W. A. KILGORE, *D. M.*

Issued September 26, 1914.  
H. M. DOAK, *Clerk.*

Return entered October 3, 1914.  
H. M. DOAK, *Clerk.*

On September 24, 1914, the following Appeal Bond was filed, to-wit:

In Equity. No. 21.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
Et Al,

*Petitioners,*

vs.

UNITED STATES OF AMERICA Et Al, *Respondents.*

---

BOND ON APPEAL.

---

*Know All Men by These Presents,* That we, the Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway, as principals, and National Surety Company, as surety, acknowledge ourselves to be jointly indebted to United States of America, Interstate Commerce Commission, City of Nashville, Tennessee, Davidson County, Tennessee, and Traffic Bureau of Nashville, Tennessee, appellees in the above cause, in the sum of Five Hundred Dollars (\$500.00), conditioned, that, whereas, on the — day of September, A.D., 1914, in the District Court of the United States for the Middle District of Tennessee, in a suit pending in that Court, wherein Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway were petitioners, and United States of America was respondent, and Interstate Commerce Commission, City of Nashville, Tennessee, Davidson County, Tennessee, and Traffic Bureau of Nashville, Tennessee, were intervening respondents, numbered on the Equity Docket as No. 21, a decree was rendered against the said Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway, and the said Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said United States of America, Interstate Commerce Commission, City of Nashville, Tennessee, Davidson County, Tennessee, and Traffic Bureau of Nashville, Tennessee, citing and ad-



monishing them to be and appear at a session of the Supreme Court of the United States, to be holden in the City of Washington, in the District of Columbia, on the — day of ——— next.

Now, if the said Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above named obligations be void, else to remain in full force and virtue.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
PRINCIPAL.

By JNO. B. KEEBLE,  
*Attorney.*

NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-  
WAY, PRINCIPAL.

By CLAUDE WALLER,  
*Attorney.*

NATIONAL SURETY COMPANY.

(SEAL) By W. P. RUTLAND,  
*Attorney-in-fact.*

Approved September 23, 1914

EDWARD T. SANFORD, *Judge.*

Endorsed:

No. 21 Equity.

Louisville & Nashville Railroad Co. vs. United States of  
America et al.

Appeal bond. Filed September 24, 1914.

H. M. DOAK, *Clerk.*

On Friday, October 16, 1914, in Equity Journal A, p. 90,  
the following decree was entered, to-wit:

LOUISVILLE & NASHVILLE RAILROAD CO. et al.,

vs.

UNITED STATES OF AMERICA, et al.

In Equity. No. 21.

In this cause it appearing to the satisfaction of the Court that further time is necessary for the printing and filing of the record on appeal in the Supreme Court of the United States, it is ordered by the Court on motion of complainants that the time within which complainants may file the record on appeal in the Supreme Court of the United States be, and the same is, extended for a period of ten days from October 23rd, or until November 2nd, 1914.

KEEBLE & SEAY,  
*Solicitors for Complainant.*

Enter:

SANFORD, *Judge.*

UNITED STATES OF AMERICA,  
MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION.

I, H. M. Doak, Clerk of the District Court of the United States in and for the Middle District of Tennessee, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and all proceedings had in cause No. 21, Equity, wherein the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway are petitioners and the United States of America is respondent, as fully as the same remains on file and of record in my office at Nashville, Tennessee.

Witness my hand officially and the seal of said Court, at  
Nashville, Tennessee, the <sup>29<sup>th</sup></sup> day of October, A.D., 1914.

H. M. Doak

*Clerk of the United States District Court for the Middle District of Tennessee.*

W. B. McLean  
Deputy Clerk.

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Office Supreme Court, U. S.

FILED

JAN 4 1915

JAMES D. MAHER

CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 673.

LOUISVILLE & NASHVILLE RAILROAD  
COMPANY AND NASHVILLE, CHAT-  
TANOOGA & ST. LOUIS RAILWAY, - Appellants,

*versus*

THE UNITED STATES OF AMERICA,  
INTERSTATE COMMERCE COMMIS-  
SION, CITY OF NASHVILLE, ET AL., - Appellees.

Appeal from the District Court of the United States for  
the Middle District of Tennessee, Nash-  
ville Division.

Notice, Motion and Grounds of Appellants  
to Advance for Hearing.

HENRY L. STONE,  
CLAUDE WALLER,  
JOHN B. KEEBLE,  
WILLIAM A. COLSTON,  
*Solicitors for Appellants.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 673.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
AND NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY, - - - - - *Appellants,*

*versus*

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, CITY OF NASH-  
VILLE, ET AL., - - - - - *Appellees.*

---

## NOTICE.

To Blackburn Esterline, Esquire,  
Special Assistant to the Attorney General of the  
United States.

Hon. Jos. W. Folk,  
Chief Counsel of the Interstate Commerce Com-  
mission.

F. M. Garard, Esquire,  
Solicitor for the City of Nashville, Tennessee.

T. J. McMorrough, Esquire,  
Solicitor for Davidson County, Tennessee.

Perkins Baxter, Esquire,  
Solicitor for the Traffic Bureau of Nashville, Ten-  
nessee.

Please take notice that the undersigned, as solicitors  
for appellants, will submit a motion before the court at

the opening of its session Monday, January 4, 1915, at or about the hour of 12 o'clock noon, or as soon thereafter as the business of the court will permit, to advance the above-styled case for hearing, and in support of said motion will file and present to the court upon submission thereof the grounds therefor, a copy of which motion and grounds being herewith served upon each of you. This 28th day of December, 1914.

HENRY L. STONE,  
 CLAUDE WALLER,  
 JOHN B. KEEBLE,  
 WILLIAM A. COLSTON,  
*Solicitors for Appellants.*

Service of the above notice is hereby accepted, and the motion to advance assented to.

Jos. W. Folk, Chief Counsel,

For the Interstate Commerce Commission, December 28, 1914.

F. M. Garard,

For the City of Nashville, Tenn., December 28, 1914.

T. J. McMorrough,

For Davidson County, Tennessee, December 29, 1914.

Chas. S. Martin,

Pres. Traffic Bureau of Nashville, Tenn., December 28, 1914.

Service of the above notice is hereby accepted this 30th day of December, 1914.

Jno. W. Davis,  
 Solicitor General for the United States.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 673.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
AND NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY, - - - - - *Appellants,*  
  
*versus*

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, CITY OF NASH-  
VILLE, ET AL., - - - - - *Appellees.*

---

## MOTION AND GROUNDS TO ADVANCE FOR HEARING.

---

And now comes the appellant, pursuant to notice accepted by the solicitors for appellees, and moves the court to advance this case for hearing at the present term or as soon thereafter as the other business of the court will permit, on the following grounds, to-wit:

(1) This suit in equity was instituted February 5, 1914, in the District Court of the United States for the Middle District of Tennessee, Nashville Division, against the United States of America to enjoin the enforcement of certain orders which the Interstate Commerce Commission made, entered and promulgated on the 9th day



of December, 1913, in a proceeding before said Interstate Commerce Commission, wherein the Traffic Bureau of Nashville, Tenn., a corporation of Tennessee, had filed a complaint under the provisions of the Act to Regulate Commerce against the Louisville & Nashville Railroad Company, Louisville & Nashville Terminal Company, Nashville, Chattanooga & St. Louis Railway, Illinois Central Railroad Company, and Tennessee Central Railroad Company, corporations engaged in the business of common carriers of freight and passengers over their respective lines of railroad between points within the United States, and particularly between points within the States of Kentucky, Tennessee and Alabama, alleging in substance that appellants' rate of \$1.00 per ton on coal to Nashville, Tenn., from Western Kentucky mines on the Louisville & Nashville Railroad and Illinois Central Railroad, and from mines in Eastern Tennessee and in Alabama on the Nashville, Chattanooga & St. Louis Railway was unreasonable in and of itself and relatively as compared with rates to such other cities as Chattanooga, Knoxville, and Memphis, Tennessee, Louisville and Covington, Kentucky, Cincinnati, Ohio, and East St. Louis, Illinois, as to appellant, Louisville & Nashville Railroad Company and as compared with rates to Chattanooga, Tennessee, with respect to the appellant, Nashville, Chattanooga & St. Louis Railway, and also attacking certain switching practices of appellants at Nashville, and in lieu thereof the Commission was asked to fix a just and reasonable rate for such transportation of coal to Nashville, Tennessee, not to exceed 50 cents per net ton and

to declare unlawful the then existing tariffs of the appellants setting forth their rates, rules and regulations governing switching of traffic at Nashville and to award to it reparation.

(2) The Interstate Commerce Commission handed down its opinion and entered its orders on the 9th day of December, 1913, holding the \$1.00 rate on coal to Nashville, Tennessee, unreasonable, and prescribing for a period of not less than two years a rate not in excess of 80 cents per ton on coal from mines on the Owensboro and Henderson Divisions of appellant, Louisville & Nashville Railroad Company, to Nashville, Tennessee, and a rate of 90 cents per ton from mines in Alabama on the lines of the Nashville, Chattanooga & St. Louis Railway, appellant, on coal to Nashville, Tennessee, and ordering appellants to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter, to abstain from the practice then existing with respect to inter-switching of interstate carload shipments of coal at Nashville, and were commanded to abstain from maintaining any different practice, with respect to switching interstate carload shipments of coal from and to tracks of the Tennessee Central Railroad Company at Nashville, Tennessee, than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.

(3) Appellants sought to enjoin the enforcement of the said orders of the Interstate Commerce Commission on the ground that the findings and orders of the Commission were wholly without substantial evidence to sup-

port them; that they were contrary to the indisputable character of the evidence; that the facts found did not as a matter of law support the orders made by the Commission; that the Commission was without jurisdiction to make the orders; and that the enforcement of the orders made by the Commission would result in the taking of appellants' property without due process of law and would result in the taking of appellants' property without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

(4) Upon appellants filing their petition in the District Court of the United States for the Middle District of Tennessee, Nashville Division, against the United States, the United States answered denying the material allegations of the petition, and the Interstate Commerce Commission intervened and likewise answered, and by petition dated February 10, 1914, the City of Nashville, Tennessee, Davidson County, Tennessee, and the Traffic Bureau of Nashville, Tennessee, were made parties defendants by order of the court dated February 10, 1914.

(5) Upon the filing of the petition, appellants moved for a restraining order and an interlocutory injunction to restrain and enjoin the enforcement of the orders of the Commission, which motions were heard by three judges (Circuit Judges Warrington and McCall and District Judge Sanford) as provided in the Emergency Deficiency Appropriation Act of October 22, 1913, and thereafter, on February 12, 1913, the court handed down its opinion and entered its order denying the restraining order; and after argument on the motion for an inter-

locutory injunction, the court took said application for an interlocutory injunction under submission, and thereafter, to-wit, on September 1, 1914, the court handed down its opinion and entered its order denying the appellants' motion for an interlocutory injunction. From this order denying appellants' application for an interlocutory injunction an appeal was prayed and granted by the court below. The assignment of errors sets forth the grounds upon which a reversal of said orders is asked on this appeal (R., 104-108).

(6) Under an act entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the fiscal year 1913, and for other purposes" (Public No. 32, H. R. 7898), the appeal from such orders lies direct to this court, and appellants request that, in accordance with said act and in accordance with Section 210 of the Judicial Code their appeal upon the foregoing facts be expedited and be assigned for a hearing at the earliest practicable day at the present term of this court, or as soon as the other business of this court will permit.

HENRY L. STONE,

CLAUDE WALLER,

JOHN B. KEEBLE,

WILLIAM A. COLSTON,

*Solicitors for Appellants.*



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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1914.

No. 673.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
AND NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY, - - - - - *Appellants,*

*vs.* BRIEF FOR APPELLANTS.

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, CITY OF NASH-  
VILLE, ET AL., - - - - - *Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE MIDDLE DIS-  
TRICT OF TENNESSEE.

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**STATEMENT OF CASE.**

**Preliminary Statement.**

This is an appeal in accordance with the provisions of an Act making appropriation to supply Urgent Deficiencies in Appropriations for the fiscal year 1913, and for other purposes (Public No. 32, H. R. 7898, approved October 22, 1913) from a decree of the District Court of

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NOTE: Where not otherwise indicated in the brief, numbers in parentheses refer to printed pages of the Transcript of Record.

the United States for the Middle District of Tennessee (three judges sitting) denying an interlocutory injunction against an order made by the Interstate Commerce Commission and entered and promulgated on the 9th day of December, 1913, a copy of which order of the Interstate Commerce Commission appears at printed pages 72 to 74 inclusive, of the transcript of record herein.

The assignment of errors upon which the appeal is prosecuted appears at printed pages 104 to 108, inclusive of the record.

The order of the Interstate Commerce Commission which is complained of relates

1. To coal rates over appellants' lines to Nashville, Tenn., and
2. To switching practices at Nashville, Tenn.

Appellants contend that the Commission erred as a matter of law, both with respect to the order as it relates to the coal rates, and with respect to the order as it relates to the switching practices.

#### **Proceedings Before the Interstate Commerce Commission.**

The proceedings before the Interstate Commerce Commission, which resulted in the order complained of were instituted by a complaint filed by the Traffic Bureau of Nashville, Tenn., against the Louisville & Nashville Railroad Company, Louisville & Nashville Terminal Company, Nashville, Chattanooga & St. Louis Railway, Illinois Central Railroad Company and Tennessee Cen-

tral Railroad Company. This complaint alleged in substance that the rate of \$1.00 per ton on coal to Nashville, Tenn., from Western Kentucky Mines on the Louisville & Nashville Railroad and Illinois Central Railroad, and from mines in Eastern Tennessee and in Alabama on the Nashville, Chattanooga & St. Louis Railway was unreasonable in and of itself and relatively as compared with rates to such other cities as Chattanooga, Knoxville, and Memphis, Tenn., Louisville and Covington, Ky., Cincinnati, Ohio, and East St. Louis, Ill., as to appellant, Louisville & Nashville Railroad Company, and as compared with rates to Chattanooga, Tenn., with respect to appellant, Nashville, Chattanooga & St. Louis Railway. The complaint also attacked certain switching practices of appellants at Nashville.

The Interstate Commerce Commission rendered its report and entered its orders in the case on the 9th day of December, 1913. Said report and orders appear at printed pages 60 to 74 inclusive of the transcript of record herein.

The Commission in its report, after stating the case (61-62), held, correctly as we think, that the detailed comparisons submitted by complainant were of little or no value, because not analogous, and that comparisons of any kind to be effective must be analogous or nearly so (63), and then made the following findings of fact and these only.

**COMMISSION'S FIRST FINDING OF FACT:**

On steam coal the \$1 per ton rate to Nashville, from Louisville & Nashville Western Kentucky mines, has been in effect since 1888. Domestic coal took a rate varying from 10 to 50 cents per ton higher. In 1896 the \$1 rate was made applicable to all except screened coal, which was given a rate of \$1.15, and this was the adjustment that obtained until December 1, 1898, when the rate on all grades of coal was fixed at \$1. For 25 years, therefore, the rate on steam coal has remained unchanged. In 1888 coal cars on the Louisville & Nashville could transport but 16 tons to the car, while the equipment of today hauls not less than 41 tons from these mines to Nashville. The tractive power of engines has also increased, and instead of 660 gross tons handled between Guthrie and Nashville in 1888, 1,165 gross tons are now handled. True the handling of coal in trainloads into Nashville appears to be the exception rather than the rule, but the increased tractive power of locomotives nevertheless is significant as tending to reduce the operating cost per unit of freight transported. But the volume of tonnage has also increased, the 193,000 tons handled in 1892 growing to nearly 450,000 tons in 1911. While there is mention of increased cost of labor and material, little more than a suggestion appears of record, and no attempt was made to show operating costs. Viewed alone, the Nashville rate, unchanged throughout its 25-year existence and producing a ton-mile revenue

of 9.2 mills for an average haul of 108.5 miles, at least commands attention. (Tr., 64.)

**COMMISSION'S SECOND FINDING OF FACT:**

From these identical Western Kentucky fields coal is hauled over the same rails up to Guthrie en route to Memphis. As stated, the movement is thence 216 miles over the Memphis Division, a total average distance of 276 miles for a rate of \$1.10, a per ton-mile revenue of slightly less than 4 mills. In other words, the Louisville & Nashville charges only 10 cents per ton more when the additional haul beyond Guthrie is 276 miles to Memphis than when it is 49 miles to Nashville. Any difference in transportation conditions, therefore, must be found beyond Guthrie. The capacity of engines is shown to be 1,165 gross tons from Guthrie to Nashville, 900 gross tons from Guthrie to Paris, Tenn., and 1,100 gross tons from Paris to Memphis. While it may be that the movement of coal to Memphis is somewhat heavier than to Nashville, there is nothing of record that indicates any substantial dissimilarity of operating conditions from these mines to either market. Defendants do not undertake to show any material difference in transportation conditions, but rely entirely upon their contention that the Memphis rate was dictated by water transportation down the Mississippi River from the Pittsburgh, Pa., mines, as it will therefore be necessary to examine the conditions at Memphis which are said to limit the rate to that point.

The present rate of \$1.10 to Memphis became effective April 1, 1911, and is an advance of 10 cents over the rate which obtained during the preceding nine years. It was the subject of complaint to this Commission, and in *Memphis Freight Bureau v. L. & N. R. R. Co.*, 26 I. C. C. 402, decided December 3, 1912, was found to be reasonable. In that case the history of the Memphis rate is completely reviewed, but will be briefly repeated here because of the earnestness with which defendants stress the river influence. When the Louisville & Nashville entered Memphis with coal from Western Kentucky, about 1882, it found the market supplied exclusively by Pittsburgh with coal which was barged down the river. Through the medium of its own coal-selling agency and with rates varying from \$1.40 to \$1.70 per ton it endeavored to meet the Pittsburgh competition until January 1, 1889, when the rate became fixed at \$1.40. This figure seems to have been amply low to insure Kentucky coal a market. In the meantime the Illinois Central entered Memphis from the same fields, but without any effect upon the rail rates. Then came the Kansas City, Memphis & Birmingham Railroad (now the Frisco) with a shorter haul from its Alabama mines, and railroad competition began, resulting in a rate of \$1.30 from Alabama and Kentucky in the latter part of 1889. Fluctuations between \$1.18 and \$1.40 occurred until 1897, when a rate of \$1.10 was established, this being increased to \$1.25 in 1889. The Kansas City, Memphis & Birmingham, desirous of securing the advantage of its shorter haul and in an endeavor also to offset the greater

cost of mining in the Alabama fields, insisted upon maintaining a 10-cent differential under the Kentucky rate, and this insistence precipitated a rate war, which bore the rate down to 45 cents, after which, on October 26, 1901, a truce was declared and a rate of \$1.25 from all mines agreed upon. On August 7, 1902, this rate was reduced to \$1 and so remained until the advance to the present \$1.10 rate on April 1, 1911. That these facts do not support the theory that water competition fixes the present Memphis rate is at once apparent and was so found in the Memphis Coal Case, *supra*, where, at page 404, we said:

This rate history clearly shows active competition between both rail and water carriers at Memphis, though the effect of the latter is now largely only potential and could not be considered as influencing either the \$1 or \$1.10 rate, especially in view of the fact that rates of \$1.40 and \$1.60 were in effect for more than the first six years that the Louisville & Nashville encountered Mississippi River competition. It would seem, therefore, that the controlling competition is between the carriers themselves, particularly the Kansas City, Memphis & Birmingham (now the Frisco), which line appears to be largely responsible for all of the reductions made since its entry into Memphis. \* \* \* It is unnecessary to comment upon the river competition further than to say it has no effect upon these rates.

So far, then, as water-borne Pittsburgh coal is concerned, it may be said to have reached the maximum of its influence when the \$1.40 rate was established. That there is railroad competition at Memphis is manifest, but



that this does not affect the Louisville & Nashville tonnage appears from the following:

The Louisville & Nashville, with 67.3 per cent of the total rail-coal tonnage to Memphis for the year 1910-11, experiences little discomfiture by reason of the 4.85 per cent handled by the Frisco, and is not seriously disturbed on account of the 24.93 per cent transported by the Illinois Central. *Memphis coal case, supra*, page 406.

But there is, or should be, equally as keen railroad competition at Nashville, and, on the whole, we are unable to find any substantial dissimilarity attaching to the transportation of coal from Western Kentucky mines on the Louisville & Nashville to Memphis and to Nashville. This, of course, excepts distance, which is greatly in favor of Nashville. (Tr., 64-66.)

#### COMMISSION'S THIRD FINDING OF FACT:

At Louisville much the same condition exists, and the 60-cent rate charged until June 1, 1913, by the Louisville & Nashville for its average haul of 142 miles in connection with the Louisville, Henderson & St. Louis Railroad, and by the Illinois Central for 125 miles, is offered for comparison by complainants, and the comparison opposed by defendants on the ground of water competition to Louisville from Pittsburgh and West Virginia mines. The Louisville coal rates from Western Kentucky have undergone a gradual reduction from \$1.50 in 1888 to \$1 in 1908, 70 and 75 cents in January, 1910, and finally 60 cents on February 28, 1910. On June 1, 1913,

subsequent to the submission of this case, the rate was advanced to 65 cents. Before the route was established between the Louisville & Nashville and the Louisville, Henderson & St. Louis, which appears to have been about 1910, the Louisville & Nashville hauled its coal via Guthrie, a distance of 179.4 miles from its Owensboro mines and 225.6 miles from its Henderson Division. There was considerable difference of opinion as to the cost of barging coal to Louisville from Pittsburgh. The Louisville & Nashville's principal witness expressed the opinion that such transportation might be had for 12.5 or 15 cents per ton, but these figures are unsubstantiated by proof and can not be regarded as controverting our finding in *Slider v. S. R'y Co.*, 24 I. C. C. 312, 313, where we said:

"All the coal involved in this case comes down the Ohio River in barges from Pennsylvania and West Virginia fields. Louisville is 134 miles below Cincinnati, and it costs complainant about *50 cents per ton more* to get his coal from the mines than it costs Cincinnati dealers."

If the barge rate is 50 cents per ton *more* to Louisville than to Cincinnati, irrespective of what might be the rate to Cincinnati, it can hardly be said that either the 60 or 65-cent rail rate is water-compelled. In fact, this is partially admitted by the leading witness for the Louisville & Nashville, who testified:

A 60-cent rate from Western Kentucky mines to Louisville is not made to meet the water competition into Louisville particularly or to meet the competition from Eastern Tennessee and Eastern Kentucky.

It was made because the Illinois Central makes a rate of 60 cents a ton from Western Kentucky to Louisville. Our coal is in precisely the same vicinity as theirs; in some cases mines are served by both railroads, and manifestly we could not get a higher rate on coal from Western Kentucky mines into Louisville than is made by our immediate competitors.

Again, then, we find that rail carrier competition is the factor of prime consideration. The Louisville & Nashville, with a 17-mile longer haul, must meet the Illinois Central rate, while the latter relies almost entirely upon the river competition in differentiating conditions at Louisville and at Nashville. There are mines on the Louisville, Henderson & St. Louis, the nearest to Louisville being 86 miles, and the farthest 136 miles, from which the rate is 50 cents, but the effect of this source of supply and the lower rate is not shown. The conditions, then, at Louisville are quite similar to those at Memphis, and at neither can they be said substantially to differ from those at Nashville. While we do not think a relationship in the matter of coal rates between these three cities should be established, we do think that a comparison of their rates properly may be drawn, giving some consideration to the fact that coal is now actually moving in considerable quantities by water to Louisville, but not permitting it to vitiate the effect of the comparison. Measured, then, by the rates to Memphis and to Louisville, the rate to Nashville is high. (Tr., 66-68.)

**COMMISSION'S FOURTH FINDING OF FACT:**

Accepting the statements of defendants that the average loading of coal cars from the mines in question is 41 tons on the Louisville & Nashville and 34.5 tons on the Nashville, Chattanooga & St. Louis, we find the \$1 rate producing a car revenue of \$41 in one instance and \$34.50 in the other, or per car-mile earnings of 37.78 cents and 24.64 cents, respectively. Assuming that all of this equipment is returned empty, the car-mile revenue for the loaded and empty movement is 18.89 cents and 12.32 cents, while the average loaded and empty car-mile revenue for all traffic during 1912 was 10.54 cents for the Louisville & Nashville and 10.8 for the Nashville, Chattanooga & St. Louis. The loading from the Illinois Central mines is not shown, but at 40 tons per car, producing a revenue of \$40 per car, the earnings per loaded car-mile for the 167-mile average haul would be 24 cents, or 12 cents per car mile for the loaded and empty movement; 34.5 tons to the car would produce a loaded car-mile rate of 26.65 cents, or 10.325 cents per car mile loaded and empty. The average car-mile earnings, loaded and empty, for all traffic during 1912 was 7.777 cents on the Illinois Central and 16.425 cents on the Tennessee Central. (Tr., 68.)

**COMMISSION'S FIFTH FINDING OF FACT:****THE NASHVILLE SWITCHING SITUATION.**

The Louisville & Nashville Terminal Company is a corporation chartered in 1903, and its entire capital stock of \$100,000 is owned by the Louisville & Nashville. Of the \$2,535,000 funded debt, bonds to the amount of \$2,500,000 are outstanding in the hands of the public, the remainder being held in the treasury of the Louisville & Nashville. These bonds are guaranteed by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis. The terminal company owns certain terminal stations, 1.07 miles of main line, and 30.32 miles of sidings. In 1896 all of its property was leased for 999 years jointly to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis. Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have individually owned tracks which they operate independently each of the other or of the terminal company, and upon these tracks industries are located. To and from these sidings as well as to and from those on the rails of the terminal company traffic of all kinds is freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis.

Prior to 1907 neither of these roads would switch freight of any kind to or from the Tennessee Central,

but in that year, "in deference to public opinion," they began switching all non-competitive traffic, *except coal*, to and from the Tennessee Central. The charge for this service is \$3 per car. Although both roads are emphatic in asserting that they have never considered the switching of coal from the Tennessee Central, the Nashville, Chattanooga & St. Louis did have effective rates applicable to and from its interchange with the Tennessee Central under which such a movement could have been accomplished for 60 cents per ton. Some surprise was expressed when this fact was developed at the hearing, and shortly thereafter this rate was cancelled. Complainants aver that this situation unjustly discriminates against coal from the Tennessee Central, that the practice with respect to switching coal at Nashville is unreasonable, and that the charge therefor (effective until shortly after the hearing) is unreasonable. While the switching tariff of the Tennessee Central is similar to those of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that road's refusal to switch coal from either of the other lines is in reality a retaliatory measure. It has styled itself a "cross-complainant" and favors this portion of petitioner's prayer. The other defendants insist that to require them to perform this switching would be to compel them to give the use of their terminal facilities to another carrier engaged in like business, in contravention of the proviso of Section 3; that their terminals are not now open to any except non-competitive traffic; and that, while coal may come from non-competitive points, the very nature of the com-

modity renders it competitive. As to the competitive character of the commodity there is little doubt; but why this attribute of coal is restricted to that from the Tennessee Central and finds no place with the coal from the Nashville, Chattanooga & St. Louis Tennessee and Alabama fields when it meets the Louisville & Nashville Kentucky coal, or vice versa, is neither clear nor defensible. It may be that these two roads regard themselves as a single entity, due to the ownership of the Louisville & Nashville of more than 70 per cent of the capital stock of the Nashville, Chattanooga & St. Louis; this would explain, but not justify. As we said in *Merchants & Mfrs.' Asso. of Baltimore v. P. R. R. Co.*, 23 I. C. C. 474, 476, "Terminals are either open or they are not," and a carrier may not exercise an arbitrary discretion, based upon a strained construction of the proviso of Section 3, in saying for what roads and what traffic it will open its terminals and for what other roads and traffic it will decline so to do. In this case the joint and the separately owned terminals of these two defendants are open to all of the traffic of the other; are open to all non-competitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate. (Tr., 69-71.)

The Commission's first four findings of fact are made with reference to appellants' coal rates. Appellants claim that the facts found do not as a matter of law support the order made with respect to the coal rates, and

that the order with respect to the coal rates should, therefore, be set aside.

The conclusion of the Commission, with reference to the coal rate was as follows (68-69):

As to the Louisville & Nashville, we are of opinion and find that the existing rate on coal to Nashville from Western Kentucky mines on its Owensboro and its Henderson divisions is unreasonable. We are of the same opinion and similarly find as to the Nashville, Chattanooga & St. Louis rate from its Tennessee and Alabama mines to Nashville. We further find that reasonable rates to Nashville from the Louisville & Nashville Western Kentucky mines on its Owensboro and its Henderson divisions should not exceed 80 cents per ton, and from the Nashville, Chattanooga & St. Louis mines in Alabama and Tennessee, the movement from which is through Alabama, 90 cents per ton.

The Illinois Central does not reach Nashville. Its rails from Western Kentucky extend only about half way and the traffic is turned over to the Tennessee Central at Hopkinsville, Ky. This route is 58.5 miles longer than the Louisville & Nashville from the same field and 27 miles in excess of the Nashville, Chattanooga & St. Louis haul from East Tennessee and Alabama; besides, it embraces two separate and distinct carriers. Furthermore, little attack was made on this rate, complainants confining themselves almost entirely to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis rates. Under all the circumstances, we can not find, upon



this record, that the Illinois Central-Tennessee Central rate is unreasonable.

Reparation is asked, but under the circumstances of this case we do not think an award should be made.

The Commission's fifth finding of fact had to do entirely with the Nashville switching situation.

The conclusion of the Commission, with respect to the Nashville switching situation was as follows (71):

Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other. Defendants will be required to cease the unjust discrimination herein found to exist and to establish and apply for the future the practice herein found to be reasonable. This disposition of the case is in consonance with the principle enunciated by the Supreme Court in *U. S. v. Terminal R. R. Asso. of St. Louis*, 224 U. S. 383.

The tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis provide that no charge will be made for switching between their respective lines at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic. This fact was

not developed at the hearing, and no prayer is made for, nor is there any testimony touching upon, the absorption of switching at Nashville. Under their restricted practice no coal has been interswitched between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis on the one hand and the Tennessee Central on the other. A compliance with our order herein will remove this restriction. We can not anticipate unjust discrimination with respect to absorption of switching charges, and no finding with respect thereto will be made on this record.

Appellants contend that the Commission was without authority to make the order which it did make with reference to the Nashville switching situation.

The substantive part of the order of the Interstate Commerce Commission, which is complained of with reference to the coal rates to Nashville, is as follows:

*It is ordered*, That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tenn.

*It is further ordered*, That defendant Louisville & Nashville Railroad Company be, and it is hereby, notified and required, to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6

of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads from mines on its Owensboro and its Henderson divisions in Western Kentucky to Nashville, Tenn., rates not in excess of 80 cents per ton.

*It is further ordered*, That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from charging, demanding, collecting, or receiving its present rates for the transportation of coal to Nashville, Tenn., from mines on its road in Alabama, and in Tennessee, the movement from which is through Alabama.

*It is further ordered*, That defendant Nashville, Chattanooga & St. Louis Railway be, and it is hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the transportation of coal in carloads to Nashville, Tenn., from mines on its road in Alabama, and in Tennessee the movement from which is through Alabama, rates not in excess of 90 cents per ton.

The substantive part of the order of the Interstate Commerce Commission with respect to the switching

practices at Nashville, which is complained of, is as follows (73-74) :

*It is further ordered*, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from their present practice with respect to interswitching interstate carload shipments of coal at Nashville, Tenn.

*It is further ordered*, That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before February 15, 1914, and for a period of not less than two years thereafter to abstain, from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.

*And it is further ordered*, That said defendants be, and they are hereby, notified and required to establish, on or before February 15, 1914, upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and posting in the manner prescribed in Section 6 of the Act to Regulate Commerce, and for a period of not less than two years after said February 15, 1914, to maintain and apply to the interswitching of interstate carload shipments of coal at Nash-

ville, Tenn., a practice which will permit the interswitching of such shipments from and to the lines of each and every defendant.

**Proceedings in the District Court of the United States  
for the Middle District of Tennessee.**

On the 5th day of February, 1914, appellants filed in the District Court of the United States for the Middle District, Nashville Division, their petition to enjoin and set aside the said orders of the Interstate Commerce Commission, a copy of which petition appears in the transcript of record beginning at the third printed page thereof. Appellants having on February 4, 1914, served notice of motion for interlocutory injunction, and having made application to Honorable E. T. Sanford, Judge of the District Court of the United States for the Middle District of Tennessee, for an early hearing thereon, he thereupon immediately called to his assistance to hear and determine the application the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable John McCall, Judge of the District Court of the United States for the Western District of Tennessee.

And, thereupon, the three judges convened the United States District Court for the Middle District of Tennessee at Nashville, Tenn., on Tuesday, February 10, 1914, at 10 o'clock A. M., in pursuance of the statutes in such cases made and provided; all the parties being present and represented by their respective counsel.

Thereupon, the said cause came on for hearing on the motion of the appellants for a temporary stay or suspension of 60 days, or until the determination of the motion for an interlocutory injunction in whole of the said orders of the Interstate Commerce Commission; the same was argued by counsel and submitted to the court, and upon consideration thereof, it was ordered that the said motion be denied (98-99).

Thereupon, the said cause came on further to be heard on the application of appellants for an interlocutory injunction against the said orders of the Interstate Commerce Commission, and all the parties respondent having stated in open court that they challenged the sufficiency of the notice given in the case, but they waived their exceptions to said notice for the purpose of this application being heard on its merits, and the said application was argued by counsel and submitted to the court and taken under advisement (99).

In support of their application for an interlocutory injunction, appellants filed on February 10, 1914, the affidavit of Geo. W. Lamb (78-80), together with statement made a part thereof, and the affidavit of C. B. Compton (81-82). From the affidavit of Geo. W. Lamb it appeared that he had testified in what was known as the Memphis Coal Rate Case, before the Interstate Commerce Commission, I. C. C. Docket No. 3998, with reference to earnings and operating expenses of the Louisville & Nashville System, and with reference to increases and decreases in the cost of operation of the Louisville & Nashville System; that he was present to testify in what is known as

the Nashville Coal Rate Case, which was initiated by the complaint of the Traffic Bureau of Nashville, Tenn., but that instead of his so testifying his testimony in the Memphis Coal Rate Case was stipulated into the record in the Nashville Coal Rate Case.

That he had had drawn to his attention a statement in the report of the Interstate Commerce Commission in the case of Traffic Bureau of Nashville, Tenn., known as the Nashville Coal Rate Case, Docket No. 4604, before the Commission, showing that in 1888 coal cars of the Louisville & Nashville Railroad Company could transport but 16 tons per car, while the present equipment hauled not less than 41 tons from the Western Kentucky mines to Nashville; that the tractive power of engines had increased; that the volume of tonnage had increased; and that while there was mention of increased cost of labor and material, little more than a suggestion appeared of record, and no attempt was made to show operating costs.

Further, that it was shown by exhibit filed by him in the Memphis Coal Rate Case, and it is true, that in spite of increases in the tonnage handled in the equipment of the Louisville & Nashville Railroad Company, and in spite of the increase in the tractive power of engines, and in spite of the increases in the volume of tonnage, and in spite of all other circumstances tending to increase the efficiency of operation, the increased cost of labor and material had been so great that the cost of earning a dollar on the lines of the Louisville & Nashville Railroad Company, or operating expense, increased from 60.43

cents in 1888 to 71.92 cents in 1911; and he attached and made part of his affidavit a true and correct statement showing results of operation of the Louisville & Nashville Railroad Company during the 33 years, July 1, 1878, to June 30, 1911, inclusive, which statement is exactly the same as the statement showing similar information filed by him in the Memphis Coal Case, and marked Exhibit G. W. L. No. 40, in that case. This statement filed by Mr. Lamb appears opposite printed page 80 of the transcript of record. Mr. Lamb further said that it was shown by him in said Memphis Coal Rate Case that the average cost per net ton mile including taxes for the 5-year period ended June 30, 1896, was .579 cents; that the average cost per net ton mile for the 5-year period ended June 30, 1911, was .580 cents.

And he showed further that the cost per ton mile, excluding taxes, for the fiscal year ended June 30, 1913, was greater than the average cost per net ton mile, including taxes, for the five years ended June 30, 1911; and further that the cost per net ton mile excluding taxes for the fiscal year ended June 30, 1913, was .6 cents, and that the cost per net ton mile ended June 30, 1913, including taxes, was .624 cents.

It was shown by the affidavit of Mr. Compton (82) that the orders complained of would result in irreparable damage to appellant, Louisville & Nashville Railroad Company, and that the nature of such irreparable damages was as follows:

There would be a reduction and loss in revenue to the Louisville & Nashville Railroad Company on



coal business received at Nashville, Tenn., of not less than \$90,000.00 per annum, and that there would be a further loss to appellant, Louisville & Nashville Railroad Company, resulting from the requirement that the Louisville & Nashville Railroad Company give the use of its tracks and terminal facilities at Nashville, Tenn., to another and competing carrier, the Tennessee Central Railroad, which is engaged in like business at that point.

And, if the reduced rates provided in the orders were put into effect and the revenues of the Louisville & Nashville Railroad Company were accordingly reduced, and it should be subsequently determined that said orders were unlawful or beyond the power of the Commission to make, the Louisville & Nashville Railroad Company would not be able to make collection of the undercharges from the shippers or consignees of the freight, and would be unable in any way to repair the damage suffered in the reduction of its rates by said orders.

And likewise, if it should be subsequently determined that said orders with respect to switching at Nashville were unlawful or beyond the power of the Commission to make, the Louisville & Nashville Railroad Company would be unable in any way to repair the damage suffered by the giving of the use of its tracks and terminal facilities to another and competing carrier engaged in like business.

In the petition filed in the District Court it is alleged (9) *inter alia*, that the Interstate Commerce Commission in making the report and orders complained of acted in a capricious and unreasonable manner, exceeded the authority delegated to it by Congress, and erred as a matter of law in the following particulars:

(a) The findings and orders made by the Commission were wholly without substantial evidence to support them.

(b) The findings and orders made by the Commission were contrary to the indisputable character of the evidence.

(c) The facts found by the Commission do not as a matter of law support the orders made by it.

(d) The Commission was without jurisdiction to make the orders.

(e) The enforcement of the orders made by the Commission will result in the taking of appellants' property without due process of law and will result in the taking of appellants' property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

Appellants also offered (5) to produce and file when and if required so to do a transcript of the record before the Interstate Commerce Commission; the great size and volume of said record being justification for not filing the same with the petition.

But appellants' contentions upon the motion for the interlocutory injunction were not based upon the allegation that the findings and orders of the Commission were wholly without substantial evidence to support them, or that the findings and orders made by the Commission were contrary to the indisputable character of the evidence, and, therefore, it was not, as it appeared to appellants, at all necessary in the determination of the motion for an interlocutory injunction that the transcript of the large record before the Commission be filed with or considered by the court.

Appellants upon the motion for the interlocutory injunction contended, and now contend:

1. That the facts found by the Commission do not as a matter of law support the orders made by it.
2. That the Commission was without jurisdiction to make the orders, and
3. That the enforcement of the orders made by the Commission results in the taking of appellants' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

And in the argument of these issues in the lower court, the primary findings of fact made by the Commission in its report, which was made a part of the orders complained of, were assumed to be undisputed, and it was contended, and it is now contended, that these findings of fact do not as a matter of law support the conclusions or the orders of the Commission complained of, and that the Commission was without jurisdiction to make the orders.

On September 1, 1914, the opinion of the District Court in the case was filed. This opinion appears at printed pages 83 to 97, inclusive, of the transcript of record herein.

And on September 8, 1914, in accordance with said opinion (101) it was decreed or ordered by the court that appellants' motion for the interlocutory injunction be denied.

And from said order and decree of the District Court of the United States for the Middle District of Tennessee, denying appellants' motion for the interlocutory injunction this appeal is prosecuted.

### **SPECIFICATION OF ERRORS.**

The assignment of errors is set forth on printed pages 104 to 108, inclusive, of the transcript of record herein.

The court erred in denying the motion for an interlocutory injunction.

We shall, as was done by the court below, discuss separately those parts of the order which relate to coal rates to Nashville, as the "order fixing rates," and those parts of the order which relate to switching practices at Nashville as "the order as to switching practices."

We contend that the lower court erred in not enjoining both the order fixing rates and the order as to switching practices, because as to each of them

1. The facts found by the Commission do not as matter of law support the order made by it.

2. The Commission was without jurisdiction to make the order, and

3. The enforcement of the order made by the Commission results in taking appellants' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

**BRIEF AND ARGUMENT.****Points.**

1. If the facts found do not as a matter of law support the orders made or if the Commission was without jurisdiction to make the orders, or if the orders result in taking appellants' property without due process of law, the interlocutory injunction should have been granted.

2. The facts found with respect to the rate order do not as a matter of law support the order fixing rates.

3. The Commission was without jurisdiction to make the order fixing rates.

4. The enforcement of the order fixing rates results in taking appellants' property without due process of law.

5. The facts found with respect to the order as to switching practices do not as a matter of law support that order.

6. The Commission was without jurisdiction to make the order as to switching practices.

7. The enforcement of the order as to switching practices takes appellants' property without due process of law.

8. Appellants made out their case for a temporary injunction.

## Argument.

### I.

IF THE FACTS FOUND DO NOT AS A MATTER OF LAW SUPPORT THE ORDERS MADE, OR IF THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE ORDERS, OR IF THE ORDERS RESULT IN TAKING APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW, THE INTERLOCUTORY INJUNCTION SHOULD HAVE BEEN GRANTED.

It is of course true that findings of fact made by the Commission *within the scope of its administrative duties* must be accepted in cases of judicial review, but that doctrine does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given. The investiture of a public body with discretion does not imply the right to abuse, but, on the contrary, carries with it as a necessary incident the command that the limits of sound discretion be not transcended, *which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess.*

(*Intermountain Rate Cases*, 234 U. S. 476, 490-491.)

The contention of the appellees, which seems to have been accepted by the lower court, that the *ultimate* findings or *conclusions* of the Commission as to the reasonableness or unreasonableness of a given rate or practice or as to an alleged undue or unreasonable prejudice or preference are conclusive upon the courts, necessarily

mean that no conclusions or orders of the Interstate Commerce Commission are subject to judicial review. The mere statement of such a proposition carries its own refutation.

A similar proposition was advanced on behalf of the United States in the case of *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U. S. 88, and was disposed of by this court, as follows (pages 91-92):

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' *Tang Tun v. Edsell*, 223 U. S. 673, 681; *Chin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonaite v. Wolf*, 226 U. S. 272; or, if the facts do not, as a

matter of law, support the order made. *United States v. B. & O. S. W. R. R. Co.*, 226 U. S. 14 Cf.; *Atlantic Coast Line v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific v. Interstate Com. Com.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247.

"2. The Government's claim is not only opposed to the ruling in *I. C. C. v. Union Pacific*, 222 U. S. 541, 547, and the cases there cited, but is contrary to the terms of the Act to Regulate Commerce, which, in its present form, provides (25 Stat. 861, Sec. 17) for methods of procedure before the Commission that 'conduce to justice.' The statute, instead of making its orders conclusive against a direct attack, expressly declares that 'they may be suspended or set aside by a court of competent jurisdiction.' 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

"3. Under the statute the carrier retains the primary right to make rates, but, if after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm. v. Northern Pacific R'y*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusion of fact (*Int. Com. Comm. v. Delaware, etc., R'y*, 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A find-



ing without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551."

Possibly Congress could have empowered the Interstate Commerce Commission to establish rates and practices for all interstate carriers and without any *ultimate* finding or *conclusion* as to the reasonableness of the rates and practices in existence, but Congress has not done so.

Under the statute, the carrier retains the primary right to make rates and to establish practices, and the Commission may set such rates or practices aside and establish new ones only when, after hearing, they are shown, in accordance with the primary facts established at such hearing, to be unreasonable. (Section 15 of the Act to Regulate Commerce as amended June 18, 1910.)

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

(*Interstate Commerce Com. v. C. G. W. R'y*, 209 U. S. 108, 119.)

In the case of *Interstate Commerce Comm. v. Nor. Pac. R'y*, 216 U. S. 538, referred to in the opinion in the Louisville & Nashville case, *supra*, this court did not accept the mere conclusion of the Commission that a reasonable and satisfactory through route did not already exist, but held in that case, just as we now contend, that where there was no difference as to *primary facts*, the conclusion of reasonableness or unreasonableness to be drawn from those facts, or legal effect of the evidence, was a question of law. In the *Northern Pacific Case*, *supra*, Mr. Justice Holmes, speaking for the court said (page 544):

“We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry, we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the Commission, but in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass.”

And while always attaching great weight to the Commission's *primary* findings of fact made within the scope of its administrative duties, this court had repeatedly reviewed and reversed the Commission's *ultimate* findings of fact or *conclusions* as to reasonableness or discrimination.

In the case of *Florida East Coast Railway Co. v. United States*, 234 U. S. 167, an *ultimate* finding or *conclusion* of the Commission as to the reasonableness of certain freight rates on the Florida East Coast Railway was reviewed and overturned.

In the Import Rate Case, *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, the Commission's *ultimate* finding or conclusion as to discrimination, and the Commission's order based thereon, were held to be invalid on the ground that the Commission erred in not considering foreign competition.

In the Georgia Commission cases, *Interstate Commerce Comm. v. Clyde Steamship Co.*, 181 U. S. 29; in the Chattanooga Board of Trade Case, *East Tennessee Va., & G. R. Co. v. I. C. C.*, 181 U. S. 1; in the Alabama Midland Case, *I. C. C. v. Ala. Mid. R'y Co.*, 168 U. S. 144; in the case of *Louisville & Nashville R. Co. v. Behlmer*, 175 U. S. 648; and in the LaGrange Case, *I. C. C. v. L. & N. R. Co.*, 190 U. S. 273, this court held invalid *ultimate* findings of fact or *conclusions* of the Commission, and orders based thereon, because the Commission ignored or declined to take into consideration competition of carriers subject to the act, just as the Commission attempts to distinguish and ignore competition of carriers subject to the act in its second and third findings of fact herein.

In the Chicago Terminal Switching Case, *I. C. C. v. Stickney*, 215 U. S. 98, and *I. C. C. v. C., B. & Q. R. Co.*, 168 U. S. 320, this court considered the effect of long established rates, of changes in those rates, and *ultimate*

findings of fact or *conclusions* of the Commission as to the reasonableness of switching rates based on the primary facts found or existing, and held that the Commission's *ultimate* finding of fact or *conclusion* as to the unreasonableness of the terminal switching charge was unsupported by the primary facts or conditions, and declared the orders of the Commission based thereon to be invalid. The first finding of fact of the Commission in the present case consists merely of the finding as to the continuance of rates for a certain period, coupled with an unsupported *assumption* that rates which have not been changed for a number of years are necessarily unreasonable. In the absence of the present statutory provision as to the burden of proof where rates are *increased*, the Commission would not be justified in holding even that the long continuance of a rate was evidence tending to show the unreasonableness of any increase therein. The Commission is utterly beyond the bounds of reason when it assumes, as it has done in this case, that the lowest rate ever in effect on a commodity in controversy must, because of its long continuance for a number of years, be necessarily unreasonable. The rates condemned by the Commission herein are not *increased* rates, but are the lowest rates which have ever been in effect on the commodity between the territories in question.

In the Elevation Allowance Cases, *I. C. C. v. Diffenbaugh*, 222 U. S. 42, the Commission's *ultimate* finding of fact or *conclusion* as to the reasonableness of elevation allowances was held invalid in so far as it condemned

the payment of any allowance on grain treated, weighed, inspected, or mixed at the elevator.

And a similar action was taken by this court in the Tap Line Cases, *U. S. v. Louisiana & Pacific Railway Company*, 234 U. S. 1, with respect to the Commission's findings and orders as to allowances to lumber lines.

In the Chicago Live Stock Case, *Chicago Live Stock Exchange v. C. G. W. R. Co., et al.*, 10 I. C. R. 428, the Commission held that higher rates for transporting cattle and hogs than were charged for transporting live stock products to Chicago from points west, northwest and southwest thereof constituted an unjust discrimination, and this *ultimate* finding of fact or *conclusion*, of the Commission, and the Commission's order based thereon, were held to be invalid by this court in the case of *Interstate Com. Comm. v. C. G. W. R'y Co.*, 209 U. S. 108.

And in the St. Louis Hay and Grain Case, *Southern Railway Company v. St. Louis Hay & Grain Co.*, 214 U. S. 297, this court held invalid an *ultimate* finding of fact or *conclusion* of the Commission and the Commission's order based thereon with respect to the unreasonableness of the reconsigning charge on hay.

And where, as in the present case, on the motion for an interlocutory injunction (85), we are not insisting that the primary facts found by the Commission were either without substantial evidence to support them or contrary to the indisputable character of the evidence, but are admitting for the purposes of the motion that the primary findings of fact made by the Commission in its report are true, it would be a vain and useless thing for

us to present the voluminous transcript of proceedings before the Commission in support of our contentions—

That the facts found by the Commission do not as a matter of law support the orders made by it.

That the Commission was without jurisdiction to make the orders, and

That the enforcement of the orders made by the Commission will result in the taking of appellants' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

In the case of *Interstate Commerce Comm. v. C., R. I. & P. R. Co.*, 218 U. S. 88, 101, the court below had held that the question involved was as to whether the principles applied in arriving at the ultimate finding or conclusion of the Commission were those within the power of the Commission to consider, and this court said (page 101):

“If this be so, we might wonder at the voluminous pleadings and the equally voluminous evidence. The elements of it were on the face of the report of the Commission.”

It is true that the statute does not in terms require the Commission to state the findings of fact upon which its conclusions are based, except in reparation cases, but the Commission did in this case state its findings of fact. Courts generally are not required by statute to give reasoned opinions, but courts generally do accompany their decisions with reasoned opinions, and this ancient and valuable practice is in fact at the foundation of our Eng-

lish jurisprudence. Eugene Wambaugh quotes Edmund Burke on this subject as follows:

"Your Committee do not find any positive law which binds the judges \* \* \* to give a reasoned opinion from the bench in support of their judgment. \* \* \* But the course hath prevailed from the oldest times. \* \* \* The judges, in their reasonings, have always been used to observe on the arguments employed by the counsel on either side, and on the authorities cited by them. \* \* \* The English jurisprudence has not any other sure foundation, nor, consequently, the lives and properties of the subject any sure hold, but in the maxims, rules and principles, and traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges), called 'Reports.' \* \* \* The elementary treatises of law, and the dogmatical treatises of English jurisprudence, whether they appear under the name of 'Institutes,' 'Digests,' or 'Commentaries,' do not rest on the authority of the supreme power, like the books called the 'Institute,' 'Digest,' 'Code,' and authentic collations in the Roman Law. With us, doctrinal books of that description have little or no authority, other than as they are supported by the adjudged cases and reasons given at one time or other from the bench, and to these they constantly refer. \* \* \* To give judgment privately is to put an end to reports, and to put an end to reports is to put an end to the law of England. \* \* \* Nothing better could be devised by human wisdom than argued judgments, publicly delivered, for preserving unbroken the great traditionary body of the law, and for marking, whilst that great body remained unaltered, every variation in the application and the construction of particular parts.

"Reports from Committee to Inspect the Lords' Journals, 11 Burke's Works (Boston Ed., 1869), 1, 41-45."

The act to regulate commerce as it stood when the old Nashville Coal Case, *I. C. C. v. Louisville & Nashv. R. Co.*, 73 Fed. 409, was decided, was, of course, somewhat different from the act as it has now been amended, but the issues in that case, in so far as rates from Western Kentucky mines were concerned, were substantially the same as now, except that the rates were then, on some classes of coal, higher than those in issue in the present case, and the principles then announced by Judge Clark generally apply at this time.

In that case Judge Clark said, page 414, 415:

"Congress having provided for such investigation and report in general terms only, it is not to be doubted that substantial conformity to a judicial proceeding was contemplated. And the importance of the Commission's action, taking substantially the form of a judicial proceeding, is apparent when it is recognized that the Commission is composed of men of ability and experience, selected for this position with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under this act. This gives to the Commission's finding and opinion great weight, and entitles it to great consideration, both by the parties affected and by the courts, when called upon to enforce obedience to its mandates. For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress in requiring such proceedings. *It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not*



*sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or, if the evidence in regard to any issues is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigations."* (Italics are ours.)

And the court held in that case (pages 418, 419) that the failure of the Commission to treat the competition at Memphis as distinguishing the rate was reversible error.

The powers of the Commission in administering the Act to Regulate Commerce are subject to definite guides and limitations which must be observed. Unless such guides and limitations are observed, and if the Commission's conclusions are not subject to review, its orders are the result of merely arbitrary power.

"It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination. But it is quite a different thing for the judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of facts; and to determine the facts necessarily involves the investigation of

evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible, judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province." (Wigmore on Evidence, Vol. II, Sec. 1353, p. 1666.)

"In short," say Pollock and Maitland, "the presence of law is marked by the administration of justice in some regular course of time, place and manner, and on the footing of some recognized general principles. These conditions appear to be sufficient, as they are necessary. But if we suppose an eastern despot to sit in the gate and deal with every case according to the impression of the moment, recognizing no rule at all, we may say that he is doing some sort of justice, but we can not say that he is doing judgment according to law." (History of English Law, Vol. I, page XXVII.)

## II.

### THE FACTS FOUND WITH RESPECT TO THE COAL RATES DO NOT AS A MATTER OF LAW SUPPORT THE ORDER FIXING RATES.

We have in our statement of the case, *supra*, set out in full the four findings of fact made by the Commission with respect to the coal rates.

They are briefly in substance as follows:

First: (64) The rate of \$1.00 from the Western Kentucky mines of the Louisville & Nashville Railroad Company to Nashville, which was complained of before the Commission, is the lowest rate found to have been charged from those mines on any class of coal for the period considered (25 years from 1888 to 1913). This rate had been charged continuously for the 25-year period

on steam coal and the other lower grades of coal. Prior to December 1, 1898, higher rates had been charged on domestic coal or on screened coal, but from December 1, 1898, to the trial of the case before Commission (14 or 15 years), the lower rate formerly applied to steam coal only had been applied to all grades of coal. During the 25-year period in question the tonnage capacity of cars, the tractive power of engines and the total volume of tonnage handled had increased. There was mention of increased cost of labor and material, but no attempt was made to show operating costs.

Second: (64-66) From the same Western Kentucky coal fields coal is hauled over the same rails up to Guthrie and then over the Memphis Division to Memphis. The average distance to Memphis is 276 miles; the rate is \$1.10, producing a ton mile revenue of about 4 mills, as compared with the average distance to Nashville of 108.5 miles, with a \$1.00 rate, producing a ton mile revenue of 9.2 mills. There is nothing of record that indicates any substantial dissimilarity of *operating* conditions from the Western Kentucky mines to the respective markets of Nashville and Memphis. The appellants contended that the Memphis rate was dictated by water competition, and was, therefore, not comparable with the Nashville rate. The facts do not support the theory that water competition fixes the present Memphis rate. The water competition did fix the Memphis rate of \$1.40. The *controlling* competition at Memphis is that between carriers, particularly the competition of the Kansas City, Memphis & Birmingham, or the Frisco, which line

has a shorter haul from its Alabama mines. The Kansas City, Memphis and Birmingham Railroad "appears to be largely responsible for all of the reductions made since its entry into Memphis." It is manifest that there is railroad competition at Memphis, but there should be (in the Commission's opinion) equally as keen railroad competition at Nashville.

Third: (66-68) The situation at Louisville is substantially the same as that at Memphis, *i. e.*, the low rates to Louisville are not forced by water competition, but are forced by the Illinois Central with a shorter line than the Louisville & Nashville. The Illinois Central (against which carrier no order was made by the Commission in this case) contends that its rates are affected by river competition. There are mines on the Louisville, Henderson & St. Louis nearer to Louisville, but the effect of this source of supply on the lower rate is not shown. In the opinion of the Commission, while some consideration should be given to the fact that coal is actually moving in considerable quantities by water to Louisville, this fact should not be permitted to vitiate the effect of the comparison, and *regardless of the controlling rail competition found to exist*, the Commission thinks that a comparison of the Louisville and Nashville rates may properly be drawn, and does measure the rate to Nashville by the rates to Memphis and to Louisville.

Fourth: (68) The \$1.00 rate produces a per car revenue of \$41.00 on the Louisville & Nashville Lines and a per car revenue of \$34.50 on the Nashville, Chattanooga & St. Louis Railway, which represent per car mile earn-

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ings for the loaded haul only of 37.78 cents and 24.64 cents, respectively. *Assuming* that all of the equipment is returned empty, the car mile earnings for the loaded and empty movement are respectively 18.89 cents and 12.32 cents. The average loaded and empty car mile revenue for all traffic during 1912 was 10.54 cents for the Louisville & Nashville R. R. and 10.8 cents for the Nashville, Chattanooga & St. Louis Railway. The loading from the Illinois Central mines is not shown (and the Commission makes no order with respect to the Illinois Central but indulges in some speculative figures as to the results for that line).

At 40 tons per car, the \$1.00 rate would produce a revenue of \$40.00 per car, which for a 167-mile average haul would result in earnings of 24 cents per loaded car mile, or 12 cents per loaded and empty car mile. 34.5 tons to the car would produce a loaded car mile rate of 26.65 cents, or 10.325 cents per car mile loaded and empty. The average car mile earnings loaded and empty for all traffic during 1912 was 7.777 cents on the Illinois Central and 16.425 cents on the Tennessee Central.

As to the first finding of fact, it appears that the statements, that little more than a suggestion of increased cost and material appears of record, and that no attempt was made to show operating costs, are contrary to the indisputable character of the evidence (affidavit of Geo. W. Lamb, Transcript of Record, printed pages 78-80, with attached statement). It was shown that (79) "in spite of increases in the tonnage handled in the equipment of the Louisville & Nashville Railroad

Company, and in spite of the increase in tractive power of engines, and in spite of increases in the volume of tonnage, and in spite of all other circumstances tending to increase the efficiency of operation, the increased cost of labor and material had been so great that the cost of earning a dollar of revenue on the lines of the Louisville & Nashville Railroad Company, or operating expense, increased from 60.43 cents in 1888 to 71.92 cents in 1911," and there was before the Commission a statement (see copy opposite printed page 80 of transcript of record) showing the results of operation of the Louisville & Nashville Railroad Company during the 33 years from July 1, 1878 to June 30, 1911, inclusive. This statement shows for the several fiscal years gross operating revenues, adjusted so as to be comparable, operating expenses similarly adjusted, net operating revenues, taxes, interest and other fixed charges, various operating results per mile, and percentages of operating expenses and other results to gross operating revenues. This statement shows that the percentage of operating expenses to gross operating revenues (see column 27) increased from 58 per cent for 1879 to 71.92 per cent for 1911, and that the percentage of operating expenses, including taxes (see column 30), increased from 59.21 per cent in 1879 to 75.49 per cent in 1911, as compared with gross operating revenues. It was also shown (79) that the average cost per net ton mile, including taxes, for the five-year period ended June 30, 1896, was .579 cents, and the average cost per net ton mile for the 5-year period ended June 30, 1911, was .580 cents. It further appears

from Mr. Lamb's affidavit (79-80) that the cost per ton mile, excluding taxes, for the fiscal year ended June 30, 1913, was greater than the average cost per net ton mile, including taxes for the five years ended June 30, 1911, and that the cost per net ton mile, excluding taxes, for the fiscal year ended June 30, 1913, was .6 cents, and that the cost per net ton mile for the fiscal year ended June 30, 1913, including taxes, was .625 cents; but these facts, as shown by Mr. Lamb's affidavit, are not now advanced in support of any contention that the findings of fact made by the Commission are contrary to the indisputable character of the evidence; they are presented to illustrate that the facts found by the Commission do not support its conclusion thereon. The inference which the Commission seeks to draw from the items of its first finding of fact is that the operating cost per unit of freight transported has been reduced, and the conclusion which the Commission reaches as a result of this inference is that, unless rates are also reduced, the rates are unreasonable. In the first place the inference is not justified by the facts stated, and the inference is shown by Mr. Lamb's affidavit to be contrary to existing facts, but even if the inference were true, that is, even if the operating costs per unit of freight transported had been in some degree reduced, such a fact would not justify a conclusion that rates heretofore existing are now unreasonable. The Commission's findings of fact show that the *average rate* on all coal had been *reduced* during the period considered. They do not, and could not show that the *operating costs* per unit had been reduced at all; but even if economies

had been effected, and operating expenses on the whole had been reduced, that fact is not sufficient of itself to justify the reduction of a reasonable and long continued rate. (*Cotting v. Kansas City Stockyards*, 183 U. S. 79.)

The tonnage capacity of cars and of locomotives and the total tonnage handled have increased on all or on practically all of the railroads in the United States within the last 25 years. And if the conclusion of the Commission in this regard were sound, it would be justified without other inquiry in reducing any rate on any railroad according to its whim or caprice.

The Commission's first finding of fact no more supports the conclusion that the coal rates complained of are unreasonable than would a finding that the box cars of the Louisville & Nashville Railroad Company are painted red support such conclusion.

As to the Commission's second finding of fact, it is noted that this is not the first time the Commission has attempted to institute comparisons between the Memphis and Nashville rates regardless of the differences in the circumstances and conditions in which the rates to the two places are made. The Commission attempted to institute such comparison in the old Nashville Rate Case, and its attempt to do so was condemned by the District Court in the case of *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 73 Fed. 409.

The Commission attempts to justify its disregard of railroad competition at Memphis by saying (66) "there is, or should be, equally as keen railroad competition at Nashville"; that is, the Commission attempts to establish



by administrative fiat a *conjectural* competition which it thinks *ought* to exist at Nashville. This court has said that competition to have any effect must be real and substantial and not a mere possibility or conjectural. (*Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 190 U. S. 273, 283.)

The real gist of the Commission's second finding of fact is that the controlling competition at Memphis is *carrier* competition, and therefore must not be considered as creating a dissimilarity of circumstances and conditions. This court has so repeatedly held that carrier competition is as effective in creating dissimilarity of circumstances and conditions, if controlling, as is water competition, that it is clear that this finding by the Commission involves a distinction without a difference.

The comments made with reference to the Commission's second finding of fact apply generally to the Commission's third finding of fact.

There is simply nothing in the Commission's fourth finding of fact to justify any conclusion as to the reasonableness or unreasonableness of rates. The Commission found or estimated certain amounts of revenue per car and per car mile. It made no finding as to the amount of property required to produce those earnings or as to the amount of expenses incurred in their production; on the contrary, it stated in its first finding of fact, *supra*, that no attempt was made to show operating costs, but even if operating costs and amounts of property devoted to the traffic had been shown, and the return on investment could have consequently been computed, such facts

would not have justified a finding of unreasonableness, because, while the fact that a carrier had earned a fair return upon its investment under a certain line of rates may be reason for holding that those rates should not be raised, the amount of return which a carrier receives is not of itself any reason for reducing rates. (*Cotting v. Kansas City Stockyards, supra.*) Surely the mere finding, that gross revenue per car for traffic is so much, or that gross revenue per car mile is so much, is not such a finding of fact as to support or tend to support any conclusion or order as to the unreasonableness of rates. Surely it can not be said that a rate which, on a heavily loaded coal car, averaging 82,000 pounds of load, yields a gross return of \$41.00 is in and of itself an unreasonable rate. Such a statement would be no more than the bald assertion that the rate of \$1.00 per ton is unreasonable without other reason than the *ipse dixit* of the assertor. And in like manner there is nothing at all in the return for loaded and empty car miles which justifies the finding of unreasonableness. The same criticism which the Commission directed to statements of high average ton mile revenues for short hauls, etc. (Commission's report, printed page 63, Transcript of Record), applies with equal force to the Commission's comparison of high average car mile revenues for short hauls. The Commission disregards the very criteria which it adopts for its own guidance. The circumstances and conditions surrounding the coal traffic in controversy are not shown to be the same, and are not the same, as the circumstances and conditions surrounding all of the traffic over the en-

tire system of either the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway or the Illinois Central or Tennessee Central. The average haul, the average loading, difficulties of operation, the proportions of high-class freight and low-class freight, and all of the other factors affecting the average results differ as between the different systems and as between the different parts of the same system. There is no logical or legal relevancy in any of the comparisons instituted by the Commission in its fourth finding of fact.

And these four findings of fact are all which the Commission made with reference to appellants' coal rates. The facts found do not as a matter of law support the orders made, and the order with respect to the coal rates should, therefore, we submit, have been enjoined.

### III.

#### THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE ORDER FIXING RATES.

In the case of *Interstate Commerce Commission v. Illinois Central Railroad Company*, 215 U. S. 452, this court said, through the present chief justice (page 470):

“Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within

the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The powers of the Commission in administering the Act to Regulate Commerce are subject to definite guides and limitations which must be observed. Those guides and limitations are to be found in the Act itself as construed by this court, and "it must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. \* \* \*

It follows that railroad companies \* \* \* in fixing their own rates may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. \* \* \*

"The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life." (*Interstate Commerce Commission v. Chicago, G. W. R'y*, 209 U. S. 108, 118-119.)

Prior to the amendment of the Act in that regard, no presumption of wrong arose from a raise in rates by a carrier. (*Chicago Great Western Case, supra*, page 119.) Certainly no presumption of wrong arises from the long

maintenance of a rate by a carrier. The Commission, in so far as it based its conclusion and orders upon its *first* finding of fact, attempted to establish a rule of law in that regard beyond what Congress itself had done, and this the Commission was without power to do.

The Commission was without power to deny to appellants the right in fixing their own rates to take into account genuine and controlling competition with other carriers, yet the Commission attempted to do this very thing in so far as it based its conclusion and orders upon its *second* and *third* findings of fact.

The Commission is without power to act arbitrarily or upon facts not logically or legally relevant, and yet this is what the Commission did in so far as it based its conclusion and order upon its *fourth* finding of fact.

And, therefore, the Commission was without any power at all to make the order fixing rates, and the order should have been enjoined on that account.

#### IV.

#### THE ENFORCEMENT OF THE COMMISSION'S ORDER FIXING RATES TAKES APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW.

Appellants' railroads are their private property which they are entitled to use and to manage upon the same principles which are regarded as sound and adopted in other trades and pursuits.

Because of the public character of the work in which railroads are engaged, the public has the power to prescribe general rules for securing faithful and efficient

service and equality between shippers and communities, but in no proper sense is the public a general manager. The public, through Congress, has in the Act to Regulate Commerce, prescribed such general rules and has enacted the two leading prohibitions that the charges of carriers shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced. (*Interstate Commerce Commission v. Chicago Great Western R'y Co.*, 209 U. S. 108, 119.)

Congress itself has not undertaken to prescribe rates for particular persons or for particular kinds of traffic. It has prescribed general rules for all. Congress itself could not prescribe special rates for particular localities or for particular kinds of traffic in particular localities, for that would be a taking of private property for private use.

The Commission, which Congress has created to administer the law, must observe the limitations of the Act which created it, as well as the limitation of the Federal Constitution. If it does not observe those limitations and prescribes general rules or rates or practices, it takes private property for public use without due process of law; and if it does not observe those limitations and prescribes particular rates for particular communities and on particular traffic, it takes private property for private use without due process of law.

There is, of course, a broad "band" of reasonable rates which this court has described as the "flexible limit of judgment which belongs to the power to make rates."

Two rates may be widely separated, and yet both may be within the "band" of reasonable rates.

The carrier retains the primary right to make rates, and under the Act to Regulate Commerce (Section 15) the Commission's right to act depends upon the existence of an affirmative showing of the unreasonableness of the rates made by the carrier. It is not sufficient that the rates which the Commission may fix would be reasonable rates if fixed by the carriers in the first instance. If the Commission fixes rates without an affirmative showing that the rates fixed by the carrier are unreasonable the Commission acts without authority of law, interferes with the use by the carrier of its own private property and takes property without due process of law.

The power of a Federal Court of Equity to enjoin one who is about to do or is threatening to enforce an unlawful act is not confined to cases where the unlawful act is the act of a legislative body, but applies equally to every case where the act is violative of the Constitution, whether the act be that of a legislative body, or of an executive body, or of a judicial body, or of an *administrative board or commission*. (*Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Interstate Com. Comm. v. L. & N. R. R. Co.*, 227 U. S. 88, 90-92.)

The affidavit of Mr. C. B. Compton (82) shows that the order fixing rates results in an irreparable annual loss to appellant, Louisville & Nashville Railroad Company of not less than \$90,000.

Appellants' verified petition shows (10) that the order fixing coal rates results in an irreparable annual loss to the Nashville, Chattanooga & St. Louis Railway of more than \$5,000.

V.

**THE FACTS FOUND BY THE COMMISSION DO NOT AS MATTER OF LAW SUPPORT THE ORDER AS TO SWITCHING PRACTICES.**

The finding of fact made by the Commission with respect to the Nashville switching situation is in substance simply this (69-71):

Appellants, the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway (the latter company being controlled by the former company), have effected a partnership or joint operating arrangement under which they have established terminal facilities for the joint use and necessities of the two contracting companies at Nashville, Tenn. A terminal company has been formed whose bonds have been guaranteed by appellants. The terminal company owns certain terminal stations, 1.07 miles of main line, and 30.32 miles of siding. *In 1896 all of the property of the terminal company was leased for 999 years jointly to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis at a rental of four (4%) per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis.* Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have individually owned tracks which



they operate independently of each other and independently of the terminal company, and upon these tracks industries are located. To and from these sidings, as well as to and from those on the rails of the terminal company, traffic of all kinds is freely interswitched by appellants. Since 1907, "in deference to public opinion" appellants have switched non-competitive traffic to and from the Tennessee Central for a charge of \$3.00 per car. From this arrangement coal is excepted as being competitive traffic. "*As to the competitive character of the commodity there is little doubt.*"

There is surely nothing in this finding of fact from which an unjust discrimination with respect to the switching practices of appellants at Nashville can be even remotely inferred. Appellants have jointly guaranteed the bonds of the terminal company and have leased the property of the terminal company for 999 years, and appellants pay the operating expenses of the terminal. In substance and effect, therefore, appellants own these terminals and operate them for their own account.

Surely unjust discrimination can not be predicated upon a use which *owners* of property permit *themselves* with respect to that property as compared with the use which those owners may permit to *other persons*.

It is clear, we think, from the mere statement of the finding of fact made by the Commission, together with the reference made by the Commission to the case of *United States v. St. Louis Terminal*, 224 U. S. 383, that no facts whatever were found with respect to the Nash-

ville switching situation which justified the interference of the Commission under the Act to Regulate Commerce. If any wrong has been done, it has been done under the Anti-Trust Act, but the Commission is without authority to administer that act.

It is impossible as a question of *fact* to infer any unjust discrimination from the finding of fact made by the Commission with respect to the Nashville switching situation. The Commission has simply erred as to its powers under the Act to Regulate Commerce and under the Anti-Trust Act, and in this respect it has committed an error of *law*. Its error in this regard should have been reviewed by the lower court and the relief asked for by appellants should have been granted.

## VI.

### THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE ORDER AS TO SWITCHING PRACTICES.

The Commission in its order as to switching practices, not only went far beyond the powers conferred upon it by the Act to Regulate Commerce, but directly contravened the provisions of the Third and Fifteenth Sections of the Act, that no common carrier shall be required to give the use of its tracks or *terminal facilities* to another carrier engaged in like business, and that in establishing any through routes the Commission shall not require any company without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or con-

trol therewith which lies between the termini of such proposed through route.

The Commission relies for support of its order upon the principle enunciated by this court in *U. S. v. Terminal R. R. Association of St. Louis*, 224 U. S. 383. That was a case under the Sherman Anti-Trust Act. The Commission has no authority to administer that Act. But even if the Commission had authority to administer that Act or to draw analogies from that decision, the Terminal Railroad Association Case is not here applicable, because there has been no such unification of terminals at Nashville as there is at St. Louis. At St. Louis, practically all of the terminals available for ingress to and egress from the city are under the control of one company, although other companies do have some facilities of their own. At Nashville, appellants have simply consolidated their interests, but have not established any kind of a monopoly of terminal facilities at that point. The Tennessee Central has its own terminal facilities and means of egress and ingress. Appellants have their own facilities and means of egress and ingress. The Commission can not in any way support its jurisdiction upon the principles enunciated by this court in the *Terminal Railroad Association Case*.

At Nashville, Tenn., switching is not done by the Louisville & Nashville for the Nashville, Chattanooga & St. Louis, nor by the Nashville, Chattanooga & St. Louis for the Louisville & Nashville. The switching for the two companies is performed by a joint terminal or switching service in the nature of a partnership arrangement

between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway.

The Louisville & Nashville Terminal Company does not perform switching at Nashville; it has simply leased its properties to the Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway for 999 years.

The operating expenses of the Nashville switching arrangement are prorated between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway on the basis of use.

All of these facts were found by the Commission (Transcript, printed pages 69-71).

Inasmuch as the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway do not, therefore, switch for each other, but switch for themselves through the joint terminal arrangement, any idea that there is any discrimination, either just or unjust, in refusing to switch—that is to say, originate or deliver—traffic of the Tennessee Central Railroad is preposterous.

But even if the petitioners did switch for each other, the statement of the Commission (70-71) that the control by the Louisville & Nashville Railroad Company of the Nashville, Chattanooga & St. Louis Railway does not justify a preference is inconsistent, and therefore arbitrary, in view of the following holding by the Commission made in the Waverly Oil Works case, decided by it just three days before the decision in the present case.

In the Waverly Oil Works case the Commission said (28 I. C. C. R. 621, 625):

“We are not impressed that these Pennsylvania lines unjustly discriminate against other lines by declining to accord the same treatment to outside railroads which they accord to one another. While the lines are independently operated, their ownership is identical. These lines have been welded into one system. It seems to us a natural thing, and one of great benefit to the public, that these family lines should treat the industries of Pittsburg as though all these lines which are in fact connected by a common ownership were under a common operation in name as well as in fact. We hold that there is no unjust discrimination arising out of the circumstance that the different members of the Pennsylvania system accord the use of their terminals to one another while refusing it on the same terms to their outside competitors.”

The orders of the Commission that the petitioners cease and desist and abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks, and that petitioners maintain and apply to the interswitching of interstate carload shipments of coal at Nashville, Tenn., a practice which will permit the *interswitching* of said shipments from and to the lines of each any every defendant, including the Tennessee Central Railroad, are unlawful and beyond the power of the Commission in that they seek to force petitioners to ad-

mit the Tennessee Central Railroad Company, with or without its consent, into a contract arrangement for operating joint terminals at Nashville, for guaranteeing interest on bonds, and for prorating operating expenses, and are inconsistent and arbitrary in requiring that *inter-switching* be provided at Nashville, Tenn., while in the Waverly Oil Works case, *supra*, the Commission held as follows (pp. 626-627):

“This leaves for determination the broad question, should the Pennsylvania system be required to handled to and from industries upon its terminals at Pittsburg freight which has been brought to Pittsburg by other lines; and if so, under what circumstances and for what compensation? The claim of the Pennsylvania is that this Commission has no such authority. That company asserts that its terminals have been created at great expense; that under the local conditions at Pittsburg they could not be duplicated; that they are necessary to the operation of the road, which could not discharge its duties as a common carrier without them, and that to compel the opening of them to other railroads would be virtually a taking of the property of that company. This situation, it is further urged, has been recognized by the Congress, since the third section of the act, while requiring the railroads subject to it to freely interchange traffic, has added these words:

‘but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.’

“In this position of the Pennsylvania there is much force. Its terminals at Pittsburg could not be enlarged materially without great expense and at some places not at all. They are none too extensive

for the business of that company. To open those terminals to its competitors without further compensation than a mere switching charge would, under the circumstances existing at Pittsburg, seem to be unjust and unreasonable. Take, as an illustration, the Wabash Railroad, which has recently obtained an entrance into Pittsburg and which has practically no terminal facilities. This road competes with the Pennsylvania for traffic to and from Pittsburg at many points. Shall it have the right to demand upon the payment of a switching charge an entrance to those terminals?

“The claim that to require the Pennsylvania to handle the cars of the Wabash for a switching charge reasonable as based upon the cost of service would be to give the use of those terminals to its competitor has great force. The Supreme Court of the United States has itself apparently so said in *L. & N. R. R. Co. v. Stock Yards Co.*, 212 U. S. 139.

“The Central Stock Yards at Louisville were located upon the Southern Railway and were the livestock station of that railroad; the Bourbon Stock Yards were located upon the Louisville & Nashville Railroad, of which they were the livestock depot. An attempt was made to compel the Louisville & Nashville to deliver stock at Louisville to the Southern Railway for transfer to the Central Stock Yards, and, conversely, to receive cars from the Southern Railway destined to the Bourbon Stock Yards. The Constitution of Kentucky contained a provision much resembling our third section, requiring the interchange of cars, and the Commission of Kentucky under that provision made an order that the Louisville & Nashville should receive cars tendered to it for the Bourbon Stock Yards. The Supreme Court held that this order was invalid, using the following language:

“ ‘There remains for consideration only the third division of the judgment which requires

the plaintiff in error to receive at the connecting point, and to switch, transport, and deliver all live stock consigned from the Central Stock Yards to any one at the Bourbon Stock Yards. This also is based upon the sections of the Constitution that have been quoted. If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point *near* its terminals by a competing road for the purpose of reaching and using its terminal station. To require such an acceptance is to take its property in a very effective sense, and can not be justified unless the railroad holds that property subject to greater liabilities than those incident to its calling alone. The Court of Appeals did not put its decision upon any supposed *special* liability, but on the *broad ground* that the State Constitution requires it and lawfully may require it of a common carrier by rail. Therefore the judgment must be reversed.'

"The holding of this Commission in *Morris Iron Co. v. B. & O. R. R. Co.*, 26 I. C. C. 240, was apparently to the same effect. Upon further consideration of the matter, we do not think that this Commission under the circumstances in this case ought as a matter of discretion, even if it could as a matter of law, to establish a mere switching charge which the competitors of the Pennsylvania lines can absorb and under which they obtain the virtual use of these terminals."



It should be especially noted that *the service ordered with respect to switching at Nashville is not a line or transportation service as distinguished from a terminal service.* In the first place, it is ordered that the practice with respect to the Tennessee Central Railroad be the same as the practice of petitioners with respect to each other—that is, that it should be an arrangement for joint operation of terminals. Strict compliance with this order would necessitate consolidation of the terminals of the Tennessee Central Railroad with the terminal properties of the Louisville & Nashville Railroad Company, the Louisville & Nashville Terminal Company, and the Nashville, Chattanooga & St. Louis Railway, and a readjustment of bond issues and operating arrangements, which things are beyond the power of the Commission to compel. In the second place, the order of the Commission contemplates, not transportation between points on the line of railroad, or switching of such magnitude that it may be considered as a line haul, as in the Detroit case, and charged for accordingly, but *inter-switching*, a pure terminal service.

In the Waverly Oil Works case the Commission did not seek to establish inter-switching, but treated the case as one of through routes and joint rates (28 I. C. C. R., p. 629, *et seq.*), and held that a carrier was entitled to the protection of its terminals by treating the terminal movement as an additional line haul.

After taking up the cases of a delivery on tracks of a carrier having the line haul and a delivery on the

tracks of a carrier other than the one having the line haul, the Commission said (p. 631):

"The rate for the movement in the second case ought to exceed that for the movement in the first case. A two-line haul is involved in the second case, as against a one-line haul in the first. The expense of handling the traffic is greater and the charge paid by the public should also be greater.

"Let it be noted that no part of that charge can be refunded to the shipper. Under the practice generally in vogue and recognized by this Commission, if a switching charge were imposed for the movement of this car by the Pennsylvania to its industry the Baltimore & Ohio could absorb or pay that switching charge, thus giving to the shipper the benefit of the rate from Baltimore to Pittsburg, but if a joint through rate be established the entire rate must be paid by the shipper and retained by the carrier.

"It should further be noted that while the joint rate to the industry upon the Pennsylvania is possibly 1 cent per 100 pounds higher than the regular rate from Baltimore to Pittsburg via either of these lines, that does not necessarily furnish the basis for dividing that rate. The Baltimore & Ohio has been relieved of a terminal service at Pittsburg and should be willing to take less for that reason than as though delivery had been upon its own track. The Pennsylvania has performed that service and should be entitled to receive, in addition to the difference between the joint and the single-line rate, something therefor from the Baltimore & Ohio; that is, the division of the Pennsylvania ought to be more than the additional charge to the public, depending upon a variety of circumstances which will not be here discussed."

No such protection is contemplated by the orders made by the Commission against petitioners in the Nashville case.

In the case of *Grand Trunk R'y v. Michigan R. R. Com.*, 231 U. S. 457, there was under consideration an amendment to the Michigan Railroad Commission Act, which specifically gave the Railroad Commission authority to require the receipt and transportation at reasonable rates of carload traffic locally consigned between points in the same city or town, or from any junction point or transfer point or intersection with another railroad in such city or town, to team tracks or other sidings on the line operated by the delivering carrier (231 U. S. 460, 34 Sup. Ct. Rep. 153, Note). *No such power has been given to the Interstate Commerce Commission.*

In the Grand Trunk case, this court said (231 U. S. 472, 34 Sup. Ct. Rep. 158):

“Considering the theatre of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks and main lines are terminal facilities in a less densely populated district.”

What the petitioners are required by the orders complained of to do is to furnish terminal or switching facilities.

Even considering the present case as one of the establishment of through routes and joint rates, we do not concede that the Commission would have the right to require the inter-switching of coal at Nashville, and this is particularly true with respect to petitioner, the Louis-

ville & Nashville Railroad Company. All coal is competitive. The Commission itself in this case held (70): "As to the competitive character of the commodity there is little doubt." And in so far as the Louisville & Nashville Railroad Company is concerned competition exists, not merely by reason of the competitive nature of the commodity, but also because the Tennessee Central Railroad for its entire length from its junction at Hopkinsville, where it obtains the coal in question from the Illinois Central Railroad, to destination at Nashville is a parallel and competing line with the Louisville & Nashville Railroad.

The Fifteenth Section of the Act to Regulate Commerce provides that in establishing through routes the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Viewing this case as one of the establishment of through routes and joint rates, the Commission can not establish a through route to the terminals of the Louisville & Nashville Railroad Company unless it embrace substantially the entire length of the Louisville & Nashville Railroad from Hopkinsville to Nashville.

The decisions in the *Kentucky and Indiana Bridge Case* (37 Fed. 567), in the case of *L. R. & M. R. Co. v.*

*St. Louis, Iron Mountain & Southern R. Co.* (41 Fed. 559 and 59 Fed. 400), and in the *Central Stock Yards case*, referred to in the Waverly Oil report, *supra*, have not been reversed. The Commission is without power to establish as part of a through route a switching service for a competing railroad, and *a fortiori* is without power to establish as part of a through route a switching service for parallel and competing railroads, such as the Tennessee Central and Louisville & Nashville.

There can be no more effective taking of the terminals of a railroad company than the requirement that that company use those terminals in delivering and originating traffic of a competitor, and manifestly the Commission is without power to require any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

## VII.

### THE ENFORCEMENT OF THE ORDER AS TO SWITCHING PRACTICES TAKES APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW.

The large amount of property involved in the order as to switching practices is shown by the Commission's finding of fact as to the Nashville Switching Situation (69-70). The practical effect of the order is shown by the affidavit of Mr. C. B. Compton (82).

If the Commission takes or destroys the use of appellants' property it takes the property itself in a most effective sense.

It is clearly the intention of Congress, as expressed in the Third and Fifteenth Sections of the Act to Regu-

late Commerce, that not only a carrier's terminal facilities and tracks, but its competing lines shall be held inviolate against appropriation to or by its competitors.

### VIII.

#### APPELLANTS HAVE MADE OUT THEIR CASE FOR A TEMPORARY INJUNCTION.

The discretionary power of the court in granting or refusing a temporary injunction should be exercised with a particular view to the relative amount of inconvenience or injury to be suffered by the parties, and even though complainant's right to permanent relief is doubtful it may be proper to maintain the *status quo* pending the determination of its right. The issuance of a temporary injunction in such case depends chiefly upon the relative inconvenience to be caused the parties.

(22 Cyc. 751, 755, 782, 783, 822, and cases cited.  
High on Injunctions, Sec. 13, pages 19 and 20.)

And in the case of *Louisville & Nashville Railroad Company v. Siler*, 186 Fed. 176, which was tried as was the present motion before three judges, the court although it denied the motion for an interlocutory injunction, nevertheless continued the restraining order to afford an opportunity to complainant to secure a review.

They say:

"It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant, pursuant to the special provision for such review found in Sec-

tion 17 of the Act of June 18, 1910. If the Supreme Court, on such review, shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the *status quo*. Applying the reasons of the rule stated in *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888, and further stated in *Cotting v. Kansas City Stockyards Co.*, *supra*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92, we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to the conditions which will be prescribed in the order to be entered."

Same, pages 203-4.

Under the doctrine of comparative hardships, when the complainant can give a bond and the defendant can not, the temporary injunction should be issued.

*Pac. Tel. & Tel. Co. v. City of Los Angeles*, 192 Fed. 1009.

*New Memphis Gas L. Co. v. City of Memphis*, 72 Fed. 952.

*Indianapolis Gas Co. v. City of Indianapolis*, 82 Fed. 245.

*Buffalo Gas Co. v. Buffalo*, 156 Fed. 370.

*Spring Valley Water Co. v. San Francisco*, 165 Fed. 667.

Appellants are willing to give bond and so stated to the lower court, but as they are both solvent and fully able to pay the amounts involved if judgment should be finally rendered against them, it seems that bond in this case is unnecessary.

It is not sufficient ground for refusing a preliminary injunction that it is not absolutely certain that com-

plainant has the right that he claims, or that the injury feared will occur, and it is not necessary on an application for a preliminary injunction that a case should be made out that would entitle the complainant to relief at all events on the final hearing. The issuance of a temporary injunction in such case depends chiefly upon the relative inconvenience to be caused the parties. (22 Cyc. 751, 941; High on Injunctions, Sec. 5, pages 8 and 9.)

It has been shown by the affidavit of Mr. C. B. Compton and from the verified petition in this case that while the rates prescribed by the Commission are in effect, the Louisville & Nashville Railroad Company is suffering *irreparable* damage at the rate of \$90,000.00 per year, and that the Nashville, Chattanooga & St. Louis Railway is suffering *irreparable* damage at the rate of \$5,000.00 per year.

And it is clear that, if these companies are required to give their joint terminals at Nashville to a competing carrier for a *switching charge*, the loss in this respect is also *irreparable*.

WHEREFORE, we confidently submit that appellants were and are entitled to the interlocutory injunction prayed for.

Respectfully submitted,

HENRY L. STONE,

WILLIAM A. COLSTON,

*Solicitors for Appellants.*

CLAUDE WALLER,

JOHN B. KEEBLE,

WILLIAM A. NORTHCUTT,

*Of Counsel.*



Office Supreme Court, U. S.

FILED

MAR 1 1915

JAMES D. MAHER

IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1914.

No. 673.

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
AND NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, CITY OF NASHVILLE,  
ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE.

REPLY BRIEF FOR APPELLANTS WITH RESPECT TO  
THAT PART OF THE "ORDER AS TO SWITCHING  
PRACTICES," WHICH REQUIRES THE LOUISVILLE  
& NASHVILLE RAILROAD COMPANY TO SWITCH  
THE COMPETITIVE COAL SHIPMENTS OF THE TEN-  
NESSEE CENTRAL RAILROAD COMPANY.

HENRY L. STONE,  
WILLIAM A. COLSTON,  
*Solicitors for Appellants.*

CLAUDE WALLER,  
JOHN B. KEEBLE,  
WM. A. NORTHCUTT,  
*Of Counsel.*

February 27, 1915.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1914.

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**No. 673.**

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
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RAILWAY, APPELLANTS,

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NESSEE CENTRAL RAILROAD COMPANY.**

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Since our original brief in this case was written there have  
come to our attention the decision of this court in *Pennsyl-  
vania Company vs. United States*, No. 591, October term,

1914, decided February 23, 1915, and the report and order of the Interstate Commerce Commission in *City of Nashville vs. L. & N. R. R. Co.*, 33 I. C. C., 76.

In the Newcastle case, *Pennsylvania Company vs. United States*, *supra*, and in the case of *Grand Trunk Ry. Co. vs. Michigan Railroad Commission*, 231 U. S., 457, the orders sustained—

(1) Were held to require transportation and not *terminal* services, and

(2) Did not involve the protection of property from a *competing carrier*.

In the present case the service required is a *terminal* service, and the Louisville & Nashville Railroad Company is ordered to devote its property to the use of a *parallel* and *competing carrier*.

The Commission found, and it is a fact (Transcript of Record, pp. 62 and 69), that the Illinois Central does not reach Nashville. Its rails from the western Kentucky coal fields extend only about half way, and the traffic is turned over to the Tennessee Central at Hopkinsville, Ky.

Hopkinsville, Ky., is on the line of the Louisville & Nashville Railroad between the western Kentucky mines on its Henderson division and Nashville. The geographical situation is shown in map attached hereto, marked Exhibit 1.

The coal from the western Kentucky mines which the Louisville & Nashville is required to switch for the Tennessee Central is competitive, not only because of the competitive character of the commodity, of which the Commission said (Tr., 70) there is little doubt, but also because the two companies own and operate from Hopkinsville into Nashville parallel and competing lines.

The order of the Commission in the NEW CASTLE SWITCHING CASE was in terms an order as to *transportation*, and was an order to discontinue an alleged unjust discrimination, which order could have been complied with by ceasing

to transport for the Baltimore and Ohio Railroad Company and other companies.

The order in the present case (Tr., 74) is in terms and in fact an order giving the use of appellants' terminal facilities at Nashville, Tennessee, to a competing carrier. Appellants are definitely required to *establish* and "to maintain and apply to the *inter-switching* of interstate carload shipments of coal at Nashville, Tennessee, a practice which will *permit* the inter-switching of such shipments" of their competitor, the Tennessee Central Railroad Company.

If there were otherwise any doubt that the Commission's order in the present case requires—

(a) The Louisville & Nashville Railroad Company to give the use of its tracks and *terminal facilities* to another carrier engaged in like business, and

(b) Requires the Louisville & Nashville Railroad Company to give the use of its tracks and terminal facilities to a competing carrier on *competitive* traffic,

that doubt is removed by the Commission's own interpretation of the order in the present case by its report in the case of *City of Nashville vs. L. & N. R. R. Co., supra*.

After showing (33 I. C. C., 77) that the tracks of the Tennessee Central are connected with the tracks of the Louisville & Nashville "by an interchange track at Vine Hill, just outside of the city on the south," and describing the creation of appellants' *terminals* (pages 78-81), the Commission said with respect to the order in the present case (page 82):

"The carriers have construed this order to relate exclusively to non-competitive coal and have responded by switching non-competitive coal from the Tennessee Central at a charge of \$3.00 per car, the same as all other non-competitive traffic, but without changing their former practice relative to competitive coal.

"The Louisville & Nashville will switch competitive coal and other competitive traffic to and from

the Tennessee Central, but only at the local rates between Nashville, Tennessee, and Overton, Tennessee, which are the rates between Nashville and Vine Hill by intermediate application.

\* \* \* \* \*

"The rates applied to this switching by the Louisville & Nashville total from \$12 to \$36 per car; the Nashville, Chattanooga & St. Louis rates, from \$7 to \$36 per car; the rates of the Tennessee Central, from \$5 to \$36 per car. These rates are virtually prohibitive. The Tennessee Central favors their reduction, but will not reduce its rates until the Louisville & Nashville and Nashville, Chattanooga & St. Louis shall agree to reduce theirs, which they refuse to do."

And further (page 85):

"The conclusion reached accords with the conclusion expressed in *Traffic Bureau of Nashville, Tenn., vs. L. & N. R. R. Co., supra*, which case defendants have interpreted too narrowly. Although that case related exclusively to coal traffic, the decision and order related to competitive as well as non-competitive coal."

The rates charged for competitive traffic interchanged at Vine Hill are *transportation* rates as distinguished from switching or *terminal* rates. The Commission specifically condemns the charge of *transportation* rates on the traffic in controversy. It seems clear that the Commission intended to give and has given the use of appellants' *terminals* and facilities to a competing carrier. But even if the service be a case of transportation and through routes and not a terminal service it is further clear that the Commission was without authority to do, as it has attempted to do, *i. e.*, require the Louisville & Nashville Railroad Company to establish on competitive coal with its competitor, the Tennessee Central Railroad Company, a through route from Hopkinsville, Kentucky, to points on its terminals in Nashville, when the

Louisville & Nashville Railroad Company itself has a line for the entire distance embraced by such through route.

We submit that if the case is one of terminal or switching service under Section 3 of the Act to Regulate Commerce the Commission was without power to make the order, because such order gives the use of the tracks and terminal facilities of the Louisville & Nashville Railroad Company to another and competing carrier engaged in like business. But if the case is to be treated as one involving a transportation service and through routes under Section 15 of the act, then the Commission was without power to make the order, because such an order requires the Louisville & Nashville Railroad Company to embrace, without its consent, in such route substantially less than the entire length of its own railroad which lies between the termini of such through route, and the Louisville & Nashville Railroad Company route is not unreasonably long, but is the shorter route between the termini.

Respectfully submitted,

HENRY L. STONE,  
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*Solicitors for Appellants.*

CLAUDE WALLER,  
JOHN B. KEEBLE,  
WM. A. NORTHCUTT,  
*Of Counsel.*

February 27, 1915.

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2588

INTERSTATE COMMERCE COMMISSION.

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No. 6484.

CITY OF NASHVILLE ET AL.

*v.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

No. 6484.

CITY OF NASHVILLE ET AL.

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

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*Submitted October 22, 1914. Decided February 1, 1915.*

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The Louisville & Nashville and Nashville, Chattanooga & St. Louis own separate terminals at Nashville, but maintain and operate them jointly under the title of "the Nashville terminals," apportioning the expenses of maintenance and operation monthly on the basis of the total number of cars of all kinds handled for each road. Through the "Nashville terminals" both roads serve the industries on each other's tracks at Nashville in addition to the industries on their own. No charge is imposed upon shippers for the service performed. The Tennessee Central, the only other road into Nashville, maintains separate terminals. The Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange noncompetitive traffic with the Tennessee Central at a charge of \$3 per car, but competitive traffic is interchanged only at the local rates to and from the points of interchange, which rates range from \$5 to \$36 per car, except that the Tennessee Central switches competitive and noncompetitive grain between the Hermitage elevator and points of interchange with the Louisville & Nashville and Nashville, Chattanooga & St. Louis for \$2 per car. At other points the Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange competitive and noncompetitive traffic with other carriers at the same rates; *Held, That—*

1. The Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange competitive and noncompetitive traffic with each other at Nashville at cost, exclusive of fixed charges; the charge of \$3 per car for switching noncompetitive traffic to and from the Tennessee Central is not shown to be unreasonable; the Tennessee Central should not be required to pay greater charges than the Louisville & Nashville and Nashville, Chattanooga & St. Louis pay each other; the charge of \$2 per car imposed by the Tennessee Central for switching grain to and from the Hermitage elevator unduly prefers that elevator.
2. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers, and since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is taken by these provisions.
3. A carrier interchanging traffic with one connecting carrier and thereby short hauling its own line can not refuse to interchange traffic with another connecting carrier solely on the ground that its own line will be short hauled thereby.



*T. M. Henderson* for Traffic Bureau of Nashville.

*M. S. Ross, Perkins Baxter, and O. P. Anderson* for Business Men's Association of Nashville.

*A. G. Ewing, jr., and F. M. Garard* for city of Nashville.

*Edward S. Jouett* for Louisville & Nashville Railroad Company.

*R. Walton Moore, J. D. B. DeBow, Frank W. Gwathmey, and Claud Waller* for Nashville, Chattanooga & St. Louis Railway.

*Walter Stokes* for Tennessee Central Railroad Company.

#### REPORT OF THE COMMISSION.

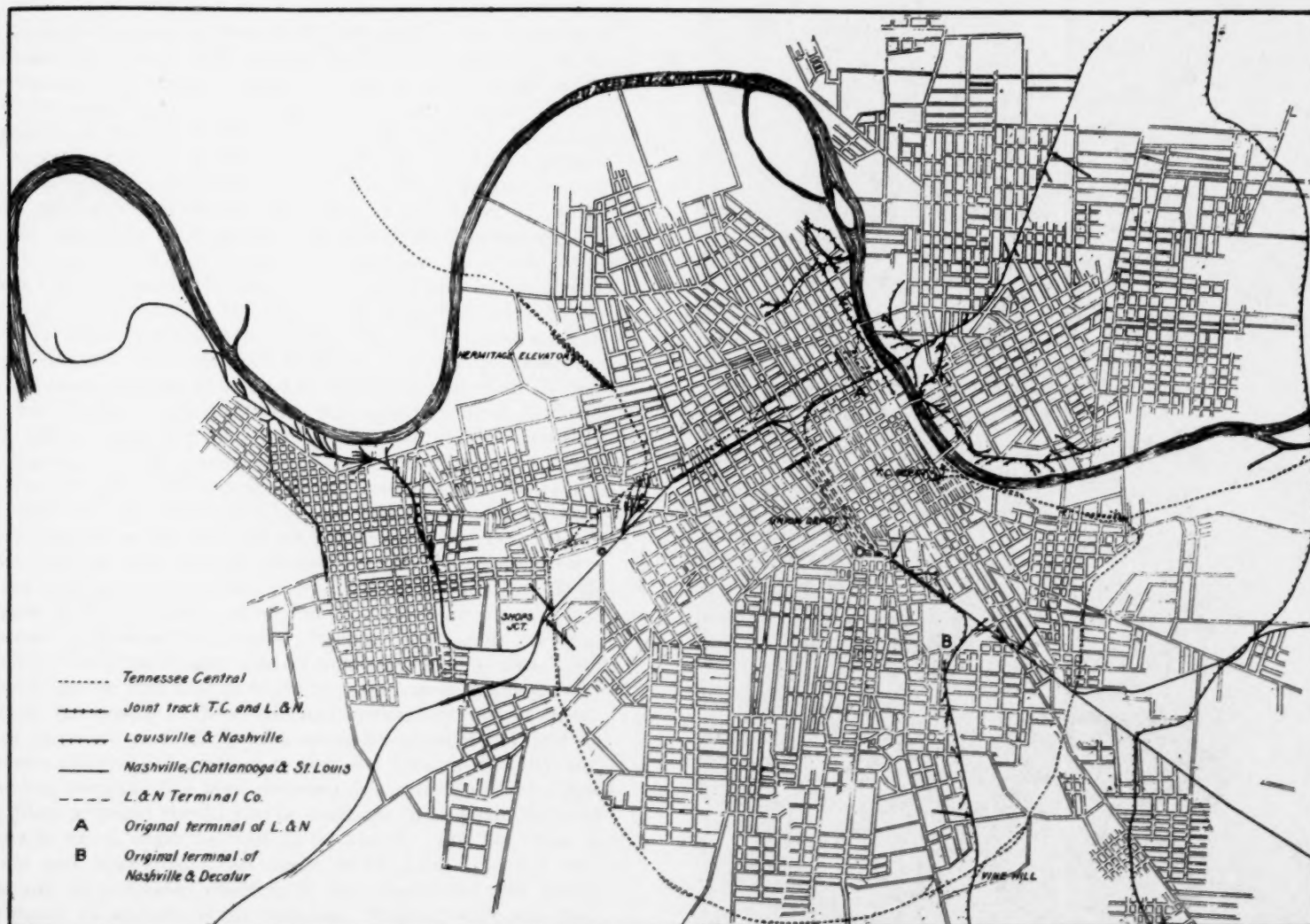
##### MEYER, *Commissioner*:

This case concerns the switching practices and charges at Nashville, Tenn. The complainants are the city of Nashville and the Traffic Bureau of Nashville. The Traffic Bureau of Nashville is a Tennessee corporation organized to promote and protect the commercial interests of Nashville and represents practically all of the large receivers and shippers of freight in Nashville. It is not organized for profit. The Business Men's Association of Nashville, a voluntary association of similar character, has intervened and joins in the complaint.

Nashville is served by three railroads: The Louisville & Nashville; the Nashville, Chattanooga & St. Louis; and the Tennessee Central. The Louisville & Nashville reaches Nashville from the north, from Cincinnati, Louisville, and St. Louis, and extends from Nashville south to Birmingham, Ala., and other southern points. The Nashville, Chattanooga & St. Louis enters the city from the west, from Hollow Rock, Tenn., where its lines from its three western termini at Hickman and Paducah, Ky., and Memphis, Tenn., converge, and extends through the city southeast to Chattanooga, Tenn., and other points. The Tennessee Central enters from the northwest, from Hopkinsville, Ky., where it connects with the Illinois Central, and extends through the city east to Harriman, Tenn., where it connects with the Southern Railway. The Louisville & Nashville and Nashville, Chattanooga & St. Louis are natural competitors for Nashville traffic, and both lines compete for Nashville traffic with the Tennessee Central. All three have extensive terminal facilities within the city, including freight depots, yards, and main, side, team, and spur tracks. The Louisville & Nashville tracks reach industries located principally in the northern, eastern, and southern sections of the city; those of the Nashville, Chattanooga & St. Louis, industries in the southern, central, and western sections; while the Tennessee Central tracks reach industries located principally in the northern, southern, and southeastern sections. The tracks of the Tennessee Central are connected with the tracks

of the Nashville, Chattanooga & St. Louis by an interchange track at Shops Junction, in the western section of the city, and with the tracks of the Louisville & Nashville by an interchange track at Vine Hill, just outside of the city on the south. The tracks of the Louisville & Nashville and Nashville, Chattanooga & St. Louis are connected at several points, but principally in the yards of the Louisville & Nashville Terminal Company, in the center of the city. The situation is illustrated by the accompanying map.

The Louisville & Nashville Terminal Company, hereinafter called the "terminal company," is best described by a brief account of its origin and development. Prior to 1872 the Louisville & Nashville line into Nashville from the north terminated at a point in the northern section of the city on the west bank of the Cumberland River. The Louisville & Nashville line from the south, the Nashville & Decatur Railroad, terminated at a point several miles south of the terminus of the northern line. Separate terminals were maintained at the two points, and the Louisville & Nashville had no tracks of its own within the city connecting them. The only other lines into Nashville at that time were the Nashville & Chattanooga from the southeast and the Nashville & Northwestern, owned by the Nashville & Chattanooga, from the west, which terminated about midway between the termini of the two Louisville & Nashville lines. The Louisville & Nashville's northern line connected with the Nashville & Northwestern at a point approximately 1 mile north of the terminus of the latter, and the Nashville & Decatur connected with the Nashville & Chattanooga near the terminus of the Nashville & Decatur. On May 1, 1872, the Nashville & Chattanooga, for an agreed annual rental, accorded to the Louisville & Nashville a perpetual right to run its trains and locomotives over a track to be constructed for the Nashville & Chattanooga by the Louisville & Nashville from the trestle then connecting the Louisville & Nashville's northern line with the Nashville & Northwestern to the depot grounds of the Nashville & Chattanooga; thence over the tracks of the Nashville & Chattanooga through said depot grounds; thence over a track to be constructed by the Louisville & Nashville as its own property from the southern approach to the Nashville & Chattanooga depot grounds to the depot of the Nashville & Decatur, alongside of the existing track of the Nashville & Chattanooga, the necessary right of way to be furnished by the Nashville & Chattanooga. It was also agreed that the Louisville & Nashville would contribute \$50,000 toward the construction of a union passenger station on the depot grounds of the Nashville & Chattanooga whenever the Nashville & Chattanooga should contribute an equal amount for the same purpose. The tracks provided for in the agreement were constructed



immediately, but not the union passenger station. In 1873 the name of the Nashville & Chattanooga was changed to Nashville, Chattanooga & St. Louis. In 1893 and to facilitate the construction of a union passenger station as tentatively proposed in the agreement of 1872, the Louisville & Nashville and Nashville, Chattanooga & St. Louis organized the terminal company. The general incorporation laws of Tennessee were amended March 17, 1893, to authorize the organization of railway terminal corporations, Laws of Tennessee, 1892, ch. 11, p. 15; and on March 23, 1893, the terminal company was incorporated under them. Following its organization the terminal company existed in name only until April 27, 1896, when the Louisville & Nashville and Nashville, Chattanooga & St. Louis leased to it for a period of 999 years all of its property and railroad appurtenances thereon which the lessors severally owned or controlled within, or in the immediate vicinity of, the original depot grounds of the Nashville & Chattanooga. The terminal company covenanted to construct upon the premises demised and other premises to be used in connection therewith all passenger and freight buildings, tracks, and other terminal facilities suitable and necessary for all railroads centering at Nashville that might contract with the terminal company therefor. Shortly thereafter, June 15, 1896, the terminal company leased back to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly all property acquired by the terminal company under the lease of April 27, 1896, together with all other property which the terminal company has subsequently acquired or which it might acquire. Both the charter of the terminal company and the act under which it was incorporated authorized the terminal company to lease its property and terminal facilities to any railroad company utilizing them upon such terms and for such time as might be agreed upon by the parties. Meanwhile the people of Nashville had become desirous of better terminal facilities, particularly of a union passenger depot, and an ordinance authorizing a contract to that end between the city and the terminal company had been proposed, but with the proviso that the facilities proposed should also be available on an equitable basis to railroads which might be built in the future. The Louisville & Nashville and Nashville, Chattanooga & St. Louis opposed this proviso and an ordinance omitting it was passed, but was vetoed by the mayor on account of the omission. Nothing more was done until June 21, 1898, when the terminal company entered into an agreement with the city of Nashville whereby the terminal company agreed to construct a union passenger station on the premises covered by the leases of April 27 and June 15, 1896, at least two freight stations, platforms, tracks, switches, etc., certain viaducts over its

tracks, and certain new streets and extensions of existing streets. The city agreed to secure the condemnation of land, to close certain existing streets, and to erect approaches to certain of the viaducts to be constructed by the terminal company. No provision was made for future railroads. The improvements agreed upon were duly made at a cost of approximately \$100,000 to the city and of several million dollars par value of bonds to the terminal company, which bonds were guaranteed by the Louisville & Nashville and Nashville, Chattanooga & St. Louis as authorized by the terminal company's charter, and were used to repay funds advanced by the guarantors to the terminal company and expended by the latter for the construction of the facilities which it had undertaken to construct. Pursuant to this agreement the terminal company constructed a union passenger station, two adjoining freight depots, a roundhouse, some coal chutes, and adjoining yard tracks. The tracks constructed are connected with the tracks of the Louisville & Nashville and of the Nashville, Chattanooga & St. Louis, but not with the tracks of the Tennessee Central. On December 3, 1902, the lease of June 15, 1896, from the terminal company to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly was modified and in part rescinded. The duration of the lease was reduced from 999 to 99 years, its monetary considerations were modified, and the lessees were reinvested in severalty with their original titles to all the property leased by them to the terminal company April 27, 1896, except for the intervening lien of the first mortgage for \$3,000,000 which had been given to secure the terminal company's bonds.

The Louisville & Nashville owns all of the capital stock of the terminal company and 71.776 per cent of the outstanding capital stock of the Nashville, Chattanooga & St. Louis, which it began to acquire in 1880.

Prior to August 15, 1900, the Louisville & Nashville and Nashville, Chattanooga & St. Louis operated their respective terminals independently. Each road switched for the other at a charge of \$2 per car, but on competitive traffic the switching charge was absorbed. Since August 15, 1900, all of their terminal facilities, including the terminal buildings, tracks, and other facilities leased by them jointly from the terminal company, except their individual team tracks and separate freight depots, have been maintained and operated jointly. The arrangement is called the "Nashville terminals" and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each. The association is not



incorporated and is not a terminal company in the sense that the principal purpose of its existence is "to furnish terminal facilities for carriers which lack them." It is a joint agency voluntarily constituted by the Louisville & Nashville and Nashville, Chattanooga & St. Louis for the joint maintenance and operation of their own facilities for their own use. The terminal tariffs of both roads publish service by the Nashville terminals and provide that "there is no switching charge to or from locations on tracks of the Nashville terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville" over either road, "regardless of whether such traffic is from or destined to competitive or noncompetitive points."

The Tennessee Central entered Nashville 1901-2 after strong opposition from the Louisville & Nashville, and leases its terminal facilities, consisting of a passenger station, freight depots, shops, main, side, and spur tracks, from the Nashville Terminal Company, a Tennessee railroad terminal corporation organized August 12, 1893, and empowered to lease its property to any railroad.

Prior to 1907 neither the Louisville & Nashville nor the Nashville, Chattanooga & St. Louis would interchange traffic with the Tennessee Central at Nashville or at any other point of connection. During 1907 both roads began to interchange with the Tennessee Central all noncompetitive traffic, except coal traffic, at a charge of \$3 per car. Noncompetitive traffic is defined as traffic between Nashville and points served by only one railroad into Nashville or points served by two or more railroads into Nashville for which, however, one road can maintain rates which the others can not meet. The interchange is effected at Shops Junction.

On December 9, 1913, upon complaint by the city of Nashville, the Traffic Bureau of Nashville, and others, this Commission found that the Louisville & Nashville and Nashville, Chattanooga & St. Louis switched all traffic for each other at Nashville, but refused to switch coal from the Tennessee Central, except at the prohibitive rate of 60 cents per ton. No differentiating conditions were found, and it was decided that the Louisville & Nashville and Nashville, Chattanooga & St. Louis unjustly discriminated against coal from the Tennessee Central in favor of coal from each other's lines. The refusal of the Tennessee Central to switch coal from the Louisville & Nashville and Nashville, Chattanooga & St. Louis was found to be a purely retaliatory measure. *Traffic Bureau of Nashville, Tenn. v. L. & N. R. R. Co.*, 28 I. C. C., 533, affirmed in *L. & N. R. R. Co. v. United States*, 216 Fed., 672. An order was entered requiring the Louisville & Nashville and Nashville, Chattanooga & St. Louis to "abstain from maintaining any different practice with respect to  
33 I. C. C.

switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks." The carriers have construed this order to relate exclusively to noncompetitive coal and have responded by switching noncompetitive coal from the Tennessee Central at a charge of \$3 per car, the same as all other noncompetitive traffic, but without changing their former practice relative to competitive coal.

The Louisville & Nashville will switch competitive coal and other competitive traffic to and from the Tennessee Central, but only at the local rates between Nashville and Overton, Tenn., which are the rates between Nashville and Vine Hill, by intermediate application. The interchange is usually effected, however, at Shops Junction and over the rails of the Nashville, Chattanooga & St. Louis. Until January 25, 1914, the Nashville, Chattanooga & St. Louis would perform the same service at the local rates between Nashville and Shops Junction. From December 14, 1913, to January 25, 1914, just after the complaint in this case was filed, however, these rates were published in the Nashville, Chattanooga & St. Louis terminal tariff with an express provision that they would apply on competitive traffic from or destined to the Tennessee Central. Since January 25, 1914, the terminal tariffs of the Nashville, Chattanooga & St. Louis have provided that competitive traffic will not be switched to and from the Tennessee Central, and no rates between Nashville and Shops Junction have been published except that the local rates between Nashville and Harding, the first station west of Shops Junction, apply intermediately. The terminal tariff of the Tennessee Central provides that Louisville & Nashville and Nashville, Chattanooga & St. Louis competitive traffic will be switched to and from Shops Junction at the Tennessee Central's local rates between Nashville and Shops Junction.

The rates applied to this switching by the Louisville & Nashville total from \$12 to \$36 per car; the Nashville, Chattanooga & St. Louis rates, from \$7 to \$36 per car; the rates of the Tennessee Central, from \$5 to \$36 per car. These rates are virtually prohibitive. The Tennessee Central favors their reduction, but will not reduce its rates until the Louisville & Nashville and Nashville, Chattanooga & St. Louis shall agree to reduce theirs, which they refuse to do.

Complainants ask that the Louisville & Nashville and Nashville, Chattanooga & St. Louis may be required to interchange with the Tennessee Central all traffic to and from the industries on their respective lines at Nashville at a uniform charge not to exceed \$2

per car, and that the Tennessee Central may be required to reciprocate.

The Tennessee Central insists that \$3 per car is not an unreasonable switching charge for noncompetitive traffic, but makes no attempt to justify its charges on competitive traffic, and no brief has been filed on its behalf. The Louisville & Nashville and Nashville, Chattanooga & St. Louis, however, hereinafter called defendants, contest the petition in its entirety. The two kinds of traffic will be considered in order.

The only evidence that the present charge of \$3 per car on noncompetitive traffic is intrinsically unreasonable, as complainants allege, is that lower charges, usually \$2 per car, are imposed at many other points. This is not enough, for it is well understood that switching conditions are seldom the same at different points. There is some evidence that the conditions at Nashville are not altogether unlike the conditions at some points where lower charges are imposed, but not enough to justify a finding that the conditions are substantially the same. Defendants, moreover, insist that the actual cost to the Nashville terminals of handling city freight traffic at Nashville is not less than \$4.13 per car, exclusive of fixed charges, as shown in the following table introduced as an exhibit:

	Charged to passenger traffic.	Charged to through and city traffic.	Charged to city traffic only.	Charged to through traffic only.
Maintenance of way and structures.....	\$16,459.16	\$85,280.26	\$132.99	.....
Maintenance of equipment.....	7,020.12	31,615.10	14,618.39	\$17,342.91
Transportation expenses.....	55,949.19	323,364.76	14,266.53	12,240.19
General expenses.....	4,191.38	26,387.00	.....	.....
Total.....	86,619.85	406,647.72	.....	.....
Distribution of through and city traffic:				
Charged to handling city traffic, 78.34 per cent.....			367,138.63	
Charged to handling through traffic, 21.66 per cent.....				101,609.06
Total.....			366,156.54	131,091.28
Number of cars handled.....			95,958	103,322
Average cost per car.....			\$4.128	\$1.269

Defendants assert that in making this estimate items definitely attributable to a particular kind of traffic were charged to that traffic, and that all other items were prorated on the basis of the relative number of hours of service of the yard crews assigned to each kind of traffic. Complainants attack the bases of apportionment used and object to the "general expense" block on the ground that it is a mere estimate based on the relation of general to total operating expenses shown in the accounts of 16 unnamed terminal companies. The objections made, however, and the analyses on which they are based are unconvincing and fail to show that defendants' figures are not



substantially correct, even though they may not be absolutely correct. We are of the opinion, therefore, that a charge of \$3 per car for switching Tennessee Central noncompetitive traffic is not shown to be unreasonably high.

Complainants contend that at Birmingham, Ala., Atlanta, Ga., New Orleans, La., and Memphis, Tenn., the charges imposed are less than the cost of the service performed and that charges equal to the cost of the service at Nashville accordingly discriminate against Nashville, but we find no evidence to substantiate this contention.

The cost to the Nashville terminals of switching competitive Tennessee Central traffic is the same as the cost of switching noncompetitive traffic. Defendants urge against a uniform charge, however, that the two kinds of traffic are essentially different in that the interchange of competitive traffic may result in the loss of line hauls, whereas the interchange of noncompetitive traffic can not result in loss but may result in gain by enabling the industries accommodated to increase the volume of their business. The interchange of competitive traffic involves short hauling and for that reason, defendants insist, can not be compelled. Complainants reply that defendants interchange both kinds of traffic on the same terms with each other at Nashville, and at other points, notably Memphis, with other carriers also, so that their refusal to do so for the Tennessee Central at Nashville unlawfully discriminates against the Tennessee Central competitive traffic and against Nashville, in contravention of section 3 of the act. Defendants rejoin that conditions are different at such other points, and, contending that they have merely exchanged trackage rights to and from industries on their respective lines at Nashville, insist that each road, through the Nashville terminals as its agent, does all of its own switching at Nashville, and that neither road does any switching for the other.

We think complainants' contentions well founded. Defendants unquestionably interchange traffic with each other and without distinction between competitive and noncompetitive traffic. The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located exclusively on one. The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of the opinion that the arrangement is essentially the same as a reciprocal switching arrangement and accordingly constitutes a facility for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines,

within the meaning of the second paragraph of section 3 of the act. The joint maintenance and operation of the tracks utilized in a sense constitutes the terminal tracks of each road the tracks of the other, but inasmuch as both roads contribute nearly the same track mileage and defray the joint expenses in proportion to the number of cars handled for each the arrangement can not differ materially in ultimate consequences from an arrangement whereby each road performs all switching over its own tracks and interswitches traffic with the other. The Louisville & Nashville contributes 8.10 miles of main and 23.80 miles of side tracks; the Nashville, Chattanooga & St. Louis, 12.15 miles of main and 26.37 miles of side tracks. We can not agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term "facility," as used in section 3 of the act, also includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements.

The conclusion reached accords with the conclusion expressed in *Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co., supra*, which case defendants have interpreted too narrowly. Although that case related exclusively to coal traffic, the decision and order related to competitive as well as noncompetitive coal. The history of defendants' terminal arrangements at Nashville is given in greater detail in this than in the former record, but discloses nothing to change our former conclusion.

Since defendants interchange traffic with each other they can not refuse to interchange traffic upon substantially the same terms with the Tennessee Central, provided the circumstances and conditions are substantially the same, and defendants are not required "to give the use of their tracks or terminal facilities" to the Tennessee Central within the meaning of the concluding proviso of section 3. *St. L., S. & P. R. R. Co. v. P. & P. U. Ry. Co.*, 26 I. C. C. 226; *Waverly Oil Works Co. v. P. R. R. Co.*, 28 I. C. C., 621; *Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co.*, 28 I. C. C., 533, affirmed in *L. & N. R. R. Co. v. United States*, 216 Fed., 672; *B., R. & P. Ry. Co. v. Pa. Co.*, 29 I. C. C., 114, affirmed in *Pa. Co. v. United States*, 214 Fed., 445; *Switching at Galesburg, Ill.*, 31 I. C. C., 294. Defendants insist upon the further limitation that they can not be compelled to "short haul" their own lines in favor of the Tennessee Central, but we can not agree with this contention. Section 1 of the act requires carriers by railroad to establish through routes and to interchange cars with connecting carriers. Through routes and the interchange of cars are thus expressly included among the facilities for the interchange of traffic which the second paragraph

of section 3 in turn requires carriers to afford to all connecting carriers equally and without discrimination in rates and charges. Section 15 empowers the Commission to establish through routes over connecting lines whenever the carriers themselves refuse or neglect to establish them voluntarily. It is true section 15 also provides that in establishing such through routes the Commission shall not "require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This provision, however, relates exclusively to the power of the Commission to establish through routes, and, since orders against discrimination by carriers between their connections in the matter of through routes are enforceable without the establishment of through routes by the Commission, does not apply to the provisions of section 3 either expressly or by necessary implication. Defendants short haul their respective lines in favor of each other, and in our opinion can not under the act as now amended refuse to interchange traffic with the Tennessee Central solely on the ground that they would thereby short haul their own lines. Defendants also insist that the ownership of 71 per cent of the capital stock of the Nashville, Chattanooga & St. Louis by the Louisville & Nashville constitutes them a single line and entitles them to accord each other more favorable treatment than they accord to other lines. This contention was repudiated in *Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co., supra*.

We do not find that the conditions of interchange of traffic between defendants' lines and the Tennessee Central differ substantially from the conditions of interchange between defendants' lines. Defendants assert that Tennessee Central cars delivered over their rails by the Nashville terminals normally return empty, whereas their own cars normally return loaded, except coal cars, and that coal cars occasionally return loaded with brick, stone, lumber, etc. No figures are given, however, nor is it clear that the difference in the return movement, if any, is not directly attributable to the interchange by defendants of competitive as well as noncompetitive traffic or possibly to the indiscriminate use of each other's cars. Tennessee Central cars can be placed at industries on defendants' rails west of Shops Junction in the same number of switching movements as defendants' cars. Tennessee Central cars necessitate an extra stop of defendants' switching

trains at Shops Junction, but are handled at that point more easily than defendants' cars are handled in the yards of the terminal company, defendants' primary classification yard. They are also hauled a shorter distance than defendants' cars. One more switching movement is required to place Tennessee Central cars at industries on defendants' rails east of Shops Junction than defendants' cars require—a movement from Shops Junction to the terminal company's yards. But since defendants' switching trains plying between the terminal company's yards and West Nashville all pass Shops Junction, the extra movement of Tennessee Central cars between Shops Junction and the yards of the terminal company can not cause much extra expense, and since noncompetitive Tennessee Central traffic is switched, such extra expense, if any, is evidently considered negligible by defendants themselves. The cost to defendants of switching competitive Tennessee Central traffic is the same as the cost of switching noncompetitive traffic. None of these conditions relative to switching Tennessee Central traffic, moreover, appears to differ materially from the conditions of interchange between defendants' lines prior to the creation of the Nashville terminals, which conditions were improved only at the very considerable expense incurred by defendants through the building operations of the terminal company.

Defendants contend that the interchange of competitive traffic with the Tennessee Central would not be mutually advantageous. In support of this contention they show that there are approximately 240 industries located exclusively on their rails, equipped with sidings that will accommodate approximately 2,350 cars, as compared with 100 industries equipped with sidings accommodating not over 700 cars located exclusively on the rails of the Tennessee Central, and that during the six months ending January 31, 1914, defendants delivered to the Tennessee Central for placement at Tennessee Central industries 245 loaded cars and 196 cars for transportation as compared with 952 cars received by defendants from the Tennessee Central for placement by the Nashville terminals and 104 cars received for transportation. These figures furnish some evidence that defendants together potentially control more traffic to and from Nashville than the Tennessee Central potentially controls and that defendants together may lose more competitive traffic through reciprocal switching than they will gain, although the figures given relative to the number of cars actually interchanged apparently relate exclusively to noncompetitive traffic. These comparisons, however, are irrelevant. Only the effect of reciprocal switching on defendants' lines individually is relevant, and as to this the record is silent. Neither is there any evidence that the

interchange of traffic between defendants' lines is mutually advantageous. If not mutually advantageous one line at least can not urge lack of mutual advantage against reciprocal switching with the Tennessee Central. If the Nashville, Chattanooga & St. Louis, for example, is willing to interchange traffic with the Louisville & Nashville, even though it loses more traffic than it gains, it is not in a position to refuse to interchange traffic with the Tennessee Central solely on the ground that more traffic will be lost than gained. Defendants assert that the industries served by them through the Nashville terminals are about equally divided between their respective lines. This does not prove, however, that the volume of traffic to and from the two groups of industries is the same or that the interchange of traffic between the two lines is mutually advantageous. General assertions are insufficient, moreover, to prove that reciprocal switching arrangements are mutually advantageous. More definite evidence should be given, preferably figures showing the precise amount of traffic surrendered or gained by each road participating in the arrangement. *Switching at Galesburg, Ill., supra.*

The Louisville & Nashville interswitches competitive and non-competitive traffic on the same terms with other carriers at several other points, notably Memphis, Tenn., and Birmingham, Ala., while the Nashville, Chattanooga & St. Louis admittedly interswitches both kinds of traffic at the same rates with all connections at all points of connection with other carriers, except Nashville and Lebanon, Tenn., where it connects with the Tennessee Central. Since November 14, 1914, a switching charge of \$2 per car for both kinds of traffic has been in effect at Lebanon. We do not find any substantial evidence that the conditions peculiar to the interchange of competitive traffic at such other points are substantially unlike the conditions at Nashville or that the interchange is mutually advantageous at such other points. Under these circumstances we think the almost unique policy pursued at Nashville requires more to justify it than has been shown.

The only use of defendants' "tracks or terminal facilities" asked by complainants for the Tennessee Central is the use incidental to the movement of Tennessee Central cars by defendants to and from industries on defendants' tracks. No use by Tennessee Central trains is asked, nor any use of defendants' freight depots or team or storage tracks. In the latter case defendants' tracks would be used for transportation conducted by the Tennessee Central. In the case of the use actually asked defendants will conduct the transportation, and the difference is more than a mere difference in degree.

Most of the industries involved are situated from 2 to 7 miles from Shops Junction. The service asked is a railroad haul, and in our

opinion constitutes transportation, as defendants tacitly concede when they argue that the local rates to and from Shops Junction and Vine Hill at which they had moved Tennessee Central competitive traffic are transportation rates for transportation to and from local points. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers. Since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is "taken" by these provisions. *G. T. Ry. Co. v. Michigan Ry. Comm.*, 231 U. S., 457; *C., M. & St. P. Ry. Co. v. Iowa*, 233 U. S., 334; *C., I. & L. Ry. Co. v. Railroad Commission*, 95 N. E., 364; *Pa. Co. v. U. S.*, 214 Fed., 445; *St. L., S. & P. R. R. Co. v. P. & P. U. Ry. Co.*, *supra*.

Complainants contend, moreover, that the local rates applied by defendants for the movement of Tennessee Central competitive traffic to and from Shops Junction have been applied as switching charges and that defendants have voluntarily subjected their tracks and terminal facilities to the use now asked for the Tennessee Central. The contention is not without merit. Defendants' terminals are admittedly open to noncompetitive Tennessee Central traffic; and the publication by the Nashville, Chattanooga & St. Louis of the rates to and from Shops Junction to apply on competitive Tennessee Central traffic in its terminal tariff from December 14, 1913, to January 25, 1914, constituted a distinct representation to the public that Tennessee Central competitive traffic would be switched at those rates by the Nashville, Chattanooga & St. Louis. Defendants explain this action on the ground that the expansion of the city had rendered Shops Junction an intracity or intraterminal point. Shippers, however, were under no duty to go behind the face of the tariff. Furthermore, no traffic other than Tennessee Central traffic is handled by defendants at Shops Junction, no pay station is maintained there, and defendants' tracks are not accessible at that point either by roadway or street. The Louisville & Nashville local rates similarly applied, which, as previously stated, are the rates between Nashville and Overton, Tenn., with intermediate application at Vine Hill, have never been published in the Louisville & Nashville terminal tariffs, but, on the other hand, have been applied to and from Shops Junction, which point is reached by the Louisville & Nashville only, through the operations of the Nashville terminals and over the rails of the Nashville, Chattanooga & St. Louis. It is fairly arguable, therefore, that the Louisville & Nashville also has applied its local rates as switching charges. But if defendants have voluntarily opened their terminals to Tennessee Central traffic they are not



being compelled to do so. *M. & M. Asso. v. P. R. R. Co.*, 23 I. C. C., 474; *Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co.*, *supra*; *Botsford & Barrett v. P. R. R. Co.*, 29 I. C. C., 469; *Seattle Chamber of Commerce v. G. N. Ry. Co.*, 30 I. C. C., 683.

The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers little direct pecuniary loss. Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located. They are subject, however, to all the disadvantages of service by a single railroad. Shipments are frequently misrouted. If the railroads are shown to be at fault, delivery is made by drays at the railroad's expense, but only after the consignee has prepaid all charges, including drayage charges, and provided the consignee has notified the railroad of the error in routing before accepting the shipment. Delivery is delayed and frequently goods are damaged by drayage. Lumber merchants located on defendants' lines can not profitably take advantage of the milling-in-transit service accorded at Nashville by the Tennessee Central. Shipments may be delayed because of a car shortage on one line, although another line has a surplus of cars. Industries located on one line lose customers at other points who prefer shipment over the other lines. These disadvantages to shippers affect Nashville as a city and hinder its growth as an industrial center.

Under all of the circumstances disclosed we are of the opinion and find that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville on the same terms as noncompetitive traffic while interchanging both kinds of traffic on the same terms with each other is unjustly discriminatory, and that so long as defendants switch both competitive and noncompetitive traffic for each other at Nashville at a charge equal to the cost of the service, exclusive of fixed charges, the charges imposed for switching Tennessee Central traffic should not exceed the cost of the service performed.

Since defendants impose no charge upon shippers for the service performed by the Nashville terminals they virtually absorb the charges which they impose upon each. The charges imposed by the Tennessee Central for switching defendants' traffic are not absorbed, either in whole or in part. However, discrimination in the matter of the absorption of charges is not alleged in the complaint nor discussed in the record and therefore can not be considered.

It appears that there are more than 20 industries at Nashville which the Nashville terminals and the Tennessee Central both serve, over the same lead tracks. There is no evidence, however, that these

industries are unduly preferred to the detriment of other industries at Nashville.

The Tennessee Central switches competitive and noncompetitive grain to and from defendant's lines from and to the Hermitage elevator located on its tracks several miles north of Shops Junction at a charge of \$2 per car, but refuses to accord this rate to other grain dealers located on its tracks at Nashville. Complainants challenge the discrimination. The conditions are not identical, but we do not find that they are sufficiently dissimilar to justify different switching charges. We find that the Tennessee Central unduly prefers the Hermitage elevator.

An order will be entered in accordance with the conclusions herein expressed.

HARLAN, *Chairman*, dissents.

33 I. C. C.



**ORDER.**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of February, A. D. 1915.

No. 6484.

**CITY OF NASHVILLE AND TRAFFIC BUREAU OF  
NASHVILLE**

v.

**LOUISVILLE & NASHVILLE RAILROAD COMPANY;  
LOUISVILLE & NASHVILLE TERMINAL COMPANY;  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY;  
NASHVILLE TERMINAL COMPANY; TENNESSEE CENTRAL  
RAILROAD COMPANY; AND H. B. CHAMBERLAIN AND W. K. McALISTER, RECEIVERS THEREOF.**

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered,* That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on the same terms as interstate noncompetitive traffic, while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory.

*It is further ordered,* That said defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to establish, on or before May 1, 1915,

upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central Railroad Company at said Nashville, rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be nondiscriminatory.

*It is further ordered*, That defendants Tennessee Central Railroad Company and its receivers, H. B. Chamberlain and W. K. McAlister, be, and they are hereby, notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain, from charging, demanding, collecting, or receiving any greater switching charges to and from other points on the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on interstate shipments of grain than are contemporaneously in effect on such shipments to and from the Hermitage elevator located on said tracks, as the present relation of such switching charges is found by the Commission in its said report to be unjustly discriminatory.

*It is further ordered*, That said defendants mentioned in the next preceding paragraph hereof be, and they are hereby, notified and required to establish, on or before May 1, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting, in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply switching charges to and from other points on the tracks of the Tennessee Central Railroad Company at said Nashville on interstate shipments of grain which are no higher than the switching charges contemporaneously in effect on such shipments to and from the Hermitage elevator located on said tracks, as such relation is found by the Commission in its said report to be nondiscriminatory.

*And it is further ordered*, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1914.

No. 673.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY  
AND NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY, - - - - - *Appellants,*

*versus*

UNITED STATES OF AMERICA, INTERSTATE COM-  
MERCE COMMISSION, CITY OF NASHVILLE,  
ET AL., - - - - - *Appellees.*

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**Appeal from the District Court of the United States  
for the Middle District of Tennessee.**

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BRIEF FOR APPELLANTS IN REPLY TO BRIEF  
FOR INTERVENERS.

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**STATEMENT.**

Intervenors devote practically their entire brief to  
their contentions—

- (1) That the ultimate findings of fact or conclusions  
of the Commission as to reasonableness or dis-  
crimination are not subject to judicial review,  
and—



- (2) That appellants forfeited their right to relief because they did not bring up the voluminous record before the Commission.

They discuss only casually the really important questions—

- (3) As to whether or not the Commission had jurisdiction to make the order as to rates upon the facts found, and—
- (4) As to whether or not the Commission had jurisdiction to make the order with respect to switching practices upon the facts found and existing in that regard.

In replying upon these four points we shall almost necessarily have to reiterate some of the arguments made in our original brief, but we will endeavor to avoid repetition as far as possible.

**BRIEF AND ARGUMENT.****Points in Reply Brief.**

- (1) The ultimate findings of fact or conclusions of the Interstate Commerce Commission, as to reasonableness or discrimination, are subject to judicial review.
- (2) It was not necessary nor even desirable upon the motion for an interlocutory injunction to bring up the voluminous record before the Interstate Commerce Commission.
- (3) The facts found, with respect to the rate order, do not, as a matter of law, support the order fixing rates, and the Commission was without jurisdiction to make that order.
- (4) The facts found, with respect to the order as to switching practices, do not, as a matter of law, support that order, and the Commission was without jurisdiction to make the order as to switching practices.

## ARGUMENT.

### I.

**The Ultimate Findings of Fact or Conclusions of the Interstate Commerce Commission, as to Reasonableness or Discrimination, are Subject to Judicial Review.**

Under the Fifteenth Section of the Act to Regulate Commerce, the Commission's *jurisdiction* to make the orders depends *in every case* upon the existence of unreasonableness or of unjust discrimination in the rates and practices under investigation.

If, therefore, the Commission's ultimate conclusions as to reasonableness and discrimination are not subject to judicial review, the *jurisdiction* of the Commission to make orders respecting rates or practices is not subject to judicial review *in any case*.

When, therefore, appellees contend that the Commission's findings of unreasonableness or of unjust discrimination are *conclusive upon the court*, they contend too much. *They contend in effect that no conclusions or orders of the Interstate Commerce Commission are subject to judicial review.*

And, as we said in our original brief (page 30), such a proposition carries its own refutation. This argument of appellees affords yet another manifestation of the tendency to which this court directed attention in the *Intermountain Rate cases*, 234 U. S. 476, 490, to seek to maintain and aggrandize a power by insisting upon propositions which, if they were accepted, would

raise the gravest questions as to the constitutional validity of the asserted power.

Of course, as was indicated by this court, in the cases of *United States v. L. & N. R. R. Co.*, 235 U. S. 314, and *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541, the courts will not substitute their judgment for that of the Commission in cases where its conclusions are supported by evidence, but when the facts found do not support the conclusion, or if, as this court said in case of *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 91, "*the facts found do not as a matter of law support the orders made*"; the court will interfere.

Congress could not, if it would, make the findings of the Commission *conclusive* upon the courts. The fixing of a rate for the future is a legislative act, but the question of the reasonableness of a rate is eminently a question for judicial investigation. *C., M. & St. P. R'y v. Minnesota*, 134 U. S. 456; *Ex Parte Young*, 209 U. S. 123. For Congress to provide that the findings of the Interstate Commerce Commission as to reasonableness or discrimination should be conclusive upon the judiciary would be an infringement upon the exclusive province of the court.

But Congress never intended to make the findings of the Commission *conclusive*. We show in an appendix hereto certain extracts from the debates upon the Hepburn Bill, and we submit that these extracts and the full debates themselves and the whole history of our legislation affecting interstate commerce, all show that, while

Congress clearly intended to give the Commission the power to fix rates for the future, a power which the Commission did not at first possess, Congress has never intended to change the rule as to review of the Commission's findings of fact by the judicial power of the government.

In our original brief (pages 33-36) we drew attention to a number of cases in which this court has reviewed and reversed the Interstate Commerce Commission's ultimate findings of fact or conclusions as to reasonableness or discrimination.

In the *Florida East Coast Railway case*, 234 U. S. 167, an ultimate finding or conclusion of the Commission as to the reasonableness of certain freight rates on the Florida East Coast Railway was reviewed and overturned. In that case the Commission had held, *Florida Fruit and Vegetable Shippers v. A. C. L. R. R. Co.*, 22 I. C. C. 11, 19:

"The financial condition of the Florida East Coast Railway has been referred to at considerable length in our previous opinions in No. 1168, and it would not be profitable to discuss that subject further here.

"Taking that into account, *together with all the other facts and circumstances bearing upon the matter*, we are of the opinion that the rates suggested for the Seaboard Air Line and the Atlantic Coast Line in the State of Florida would be just and reasonable to apply upon the railroad of the Florida East Coast Railway Co. *Those rates are already in effect upon pineapples and do not involve any extraordinary reductions from rates on vegetables and*

*citrus fruits which that company has voluntarily established.*" (Italics are ours.)

The report and order of the Commission under consideration by this court in the *Florida East Coast Railway case* were made on a supplemental petition in a controversy twice before heard and decided by the Commission, which controversy involved the rates on pineapples, citrus fruits and vegetables from Florida producing points to exterior points of distribution or consumption. The rates referred to in the quotation, *supra*, "as just and reasonable rates to apply upon the Florida East Coast Railway Co." were "gathering" rates upon *citrus fruits* and *vegetables* up to Jacksonville when destined for points beyond. The Commission made three reports in the case, No. 1168, as follows:

- Florida Fruit & Vegetable Shippers v. A. C. L. R. R. Co.*, 14 I. C. C. 476, June 25, 1908.  
*Florida Fruit & Vegetable Shippers v. A. C. L. R. R. Co.*, 17 I. C. C. 552, February 8, 1910.  
*Florida Fruit & Vegetable Shippers v. A. C. L. R. R. Co.*, 22 I. C. C. 11, November 6, 1911.

The record before this court consisted of the three reports of the Commission, the testimony taken before the Commission in the last hearing, and the testimony taken in the Commerce Court. The testimony taken in the two earlier hearings before the Commission was not in the record. It was stipulated that the facts stated by the Commission in its reports relating to those hearings should be taken as the facts of record therein.

Under Section 16 of the Act to Regulate Commerce, the Commission is authorized "to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

Section 16a of the Act provides that after a *decision*, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein. And if, in its judgment, after rehearing and the consideration of *all* facts, including those arising since the former hearing, it shall appear that the original *decision*, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly.

The Commission in its first decision unquestionably held that the rates on pineapples, citrus fruit and vegetables up to Jacksonville were as low as they ought to be under all the circumstances (234 U. S. 176-178).

The Commission in its last *decision* unquestionably held that the same rates were unjust and unreasonable to the extent that they exceeded the rates which would result from the application of the distance tariff prescribed by it (22 I. C. C. 20).

With respect to the rates on pineapples on the East Coast Line the Commission decided to strike off its holding as to reasonableness and to take the whole matter under advisement. An order was passed to that effect, the parties were so notified, and were fully heard in proof and in argument (17 I. C. C. 559).

And the Commission averred that it reversed its decision as to the rates of the Florida East Coast Railway on vegetables and citrus fruits after taking into account the financial condition of that line together with *all the other facts* and circumstances bearing upon the matter (22 I. C. C. 19).

We have not the records before the Commission and Commerce Court, but from the reports of the Commission, from the abstract of argument for the United States (234 U. S. 168) and from the opinion of this court it appears that upon the rehearing the record showed the following facts:

#### *Comparisons.*

Comparisons of rates on oranges from California and Florida to the same consuming points showed that the actual rate paid by the California fruit was less per box than that paid by the Florida fruit, although the distance is twice as great. The rate from California was higher than the Commission had previously found to be reasonable. The total rates from Arcadia, Fla., a representative shipping point, to New York, a distance of 1,242 miles, was 75½ cents, of which one-third represented the movement up to Jacksonville. The "gathering" movement averaged a distance of 200 miles and a charge of 25 cents. From this and from other comparisons which were afforded it appears that for the *same car*, the earnings per car mile or per ton mile for the movement up to Jacksonville were twice as great as for the movement beyond. Similar comparisons were afforded for rates on



vegetables and pineapples (14 I. C. C. 480-483, 501-503).

The average receipts of the Atlantic Coast Line for the year ending June 30, 1907, were 1.235 cents per ton mile, and of the Seaboard Air Line 1.118 cents per ton mile (14 I. C. C. 489-490). These were compared with the revenue per ton mile on oranges from Jacksonville to Richmond, 1.38 cents, and comparisons of these results with a ton-mile revenue of 3.125 cents arising from a rate of 25 cents per 80-pound box for a haul of 200 miles would be no more absurd than are the ton-mile and car-mile comparisons made in the Commission's findings of fact in the present case. Comparisons of earnings per car and per train on different commodities were also afforded, but they were not relevant to the reasonableness of the charge up to Jacksonville, just as they are not relevant in the present case.

Comparisons were also afforded of the rate up to Jacksonville with the divisions of the through rate applying for other parts of the haul (14 I. C. C. 487, 490-491).

The finding of the Commission in its first report (234 U. S. 175, 14 I. C. C. 483-4) with reference to the shape and location of the State of Florida, the density of traffic, through connections and business, and the nature of the traffic originated and received related alike to the Florida East Coast Railway, the Seaboard Air Line and the Atlantic Coast Line. While the gross earnings of the Atlantic Coast Line were greater in other States they were only \$4,210.00 per mile in the State of Florida (14 I. C. C. 488). And the following comparisons per mile of road

are available from page 484 of the Commission's first report:

	Seaboard Air Line	Atlantic Coast Line	Florida East Coast Railway
Receipts . . .	\$5,000.00	\$4,200.00	\$5,911.00
Expenses . . .	3,900.00 (78%)	3,150.00 (75%)	4,502.00
Net . . . . .	1,100.00	1,050.00	1,409.00

The East Coast Line exceeded the other two roads in earnings, both gross and net, per mile.

"During the season of 1910, the Atlantic Coast Line handled 2,901,936 boxes of citrus fruits and 1,500,000 miscellaneous crates; total 4,401,936. The Florida East Coast handled 669,584 boxes of citrus fruits, 600,000 crates pineapples, and 1,890,000 miscellaneous crates; total 3,159,584. The Seaboard Air Line handled 780,387 boxes of citrus fruits and 1,391,335 miscellaneous crates; total 2,171,722. In the volume of traffic handled the appellant stands between the Atlantic Coast Line and the Seaboard Air Line." (*Abstract Argument for U. S.*, 234 U. S. 169.)

#### *Financial Conditions of the Florida East Coast Railway.*

From the second report of the Commission, rendered February 8, 1910, the following facts appear as to the financial condition of the Florida East Coast Railway Company at that time. The capitalization was \$33,000,000, which, with the exception of about \$4,000,000, represents an actual cash investment; eliminating \$14,000,000 for the line south of Miami, the property had never earned in any year 6 per cent upon the investment with the

single exception of the year 1909 (17 I. C. C. 564, 234 U. S. 180).

From the abstract of argument for the United States (234 U. S. 170) it appears that there had been a considerable improvement before the Commission's last report, rendered November 6, 1911. For the year ending June 30, 1911, the net operating revenue from the main line was \$1,272,908.19. According to showing made by the East Coast Line, that sum would more than pay a dividend of 8 per cent on the capitalization of \$15,000,000 for the main line.

*With Particular Relation to the Rates on Pineapples.*

The Florida East Coast Railway, with its connections, maintained a rate of 66½ cents from Habana to Chicago out of which the East Coast Line and its connections north of Jacksonville received an amount less than the charge for Florida pineapples, although the distance is greater and the service practically the same. But the Commission recognized that this forced rate could not be taken as a standard by which to measure the reasonableness of a rate upon local business (17 I. C. C. 566) just as we are now contending that the Commission can not take the forced rates on coal to Memphis and Louisville as standards by which to measure the reasonableness of the local rate on coal to Nashville.

The vice-president of the Florida East Coast Railway stated that he had always thought that carload rates should be established and that in his opinion to establish

carload rates 3 cents per box less than the existing any-quantity rates would not prejudice the net revenues of his company (17 I. C. C. 565).

*With Respect to the Proper Relation of Rates on Vegetables and Citrus Fruits to the Rates on Pineapples.*

In its first report the Commission saw no reason why its holding with respect to rates upon citrus fruits should not apply also to pineapples. The service rendered is exactly the same. The character of the fruit is such that it requires a service of practically the same character as the orange (14 I. C. C. 503).

All the incidents of transportation of pineapples and oranges are the same; the value of the two commodities is practically the same (17 I. C. C. 563).

Vegetables are somewhat more bulky than oranges (14 I. C. C. 496).

But the Commission did not base its final decision upon any of these facts. It based its ultimate action upon what it understood to be changed conditions with respect to:

- a. The rates established by the Florida Railroad Commission and the opinion of that Commission relating thereto and (22 I. C. C. 14).
- b. The effect upon traffic up to the base point of carload rates which had been established from the base point to destinations (22 I. C. C. 15).

And this court did not go into the detail of all the facts which might be shown by the record to support the Commission's conclusions but regardless of the Commis-

sion's indication (22 I. C. C. 19) that it had considered all the facts, had recourse to the last *report* (234 U. S. 183) and *upon the face of that report* determined the *ratio decidendi* to be "changed conditions." And the court's review of the testimony in the last proceeding was limited to the analysis of the primary facts as to changed conditions including: (a) The testimony of the Chairman of the Florida Railroad Commission that there had been a considerable increase in the volume of traffic; (b) a further statement or admission by an officer of the East Coast Line as to saving in cost of loading carload shipments; and (c) testimony with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line) to the effect that on those roads it had come to pass that there was a saving in expense and an increase in earning capacity. And this court weighed the primary facts so limited and determined and because they did not support the conclusion of the Commission remanded the case with directions to restrain the enforcement of the Commission's order.

While this court has used language which dissociated from the cases in which uttered might seem to indicate that the findings of the Interstate Commerce Commission upon questions of reasonableness or discrimination are conclusive, the whole course of the court in such cases shows otherwise and we repeat the maxim as to unnecessarily broad language uttered by Chief Justice Marshall in a similar connection. *Cohens v. Virginia*, 6 Wheat. 399;

“It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

## II.

### **It Was Not Necessary Nor Even Desirable upon the Motion for an Interlocutory Injunction to Bring up the Voluminous Record before the Interstate Commerce Commission.**

We have shown how in the *Florida East Coast Railway case*, 234 U. S. 167, this court ignored all facts except those directly involved in the doctrine of the case as set forth on the face of the Commission's report.

In many cases involving the orders of the Interstate Commerce Commission that which purports to be an ultimate conclusion of fact is in reality so interwoven with the question of law as to be in substance a decision of the latter. We think the present case is such a case. And as the questions involved here are not questions of fact, but questions of power, the elements of the matter are, as this court said in the case of *Interstate Comm. Com. v. C., R. I. & P. R'y*, 218 U. S. 88, 101, “on the face of the report of the Commission.”

The orders of the Commission may take effect within thirty days and continue in force not more than two years. (Section 15, Act to Regulate Commerce.) Suits to set aside such orders are commenced by filing in the proper

District Court a petition, copies of which must be served by the Marshal of the District of Columbia by filing in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice (Sec. 209, Judicial Code. Same rule now as to District Courts.) No interlocutory injunction in such cases can be issued unless the application for same shall be presented to a circuit or district judge and shall be heard and determined by three judges. When such application is presented to one judge, he must call to his assistance two other judges, and when plaintiff learns what date will be convenient for the three judges to convene, he must give at least five days' notice of the hearing to the Interstate Commerce Commission to the Attorney General and to such other persons as may be defendants in the suit. It requires considerable time to get together even an ordinary record before the Commission, including transcript and exhibits, and to have such record checked and verified by the Secretary of the Commission. By reference to page 6 of the brief for interveners it will be noted that in addition to the regular record in this case *there were stipulated into the instant record the records in five other important cases and any record in the office of the Commission.* It was manifestly a physical impossibility to produce this record upon the interlocutory motion. Such production was not necessary and would, it seems, have been contrary to the spirit of the new equity rules, and particularly of the rules relating to the reduction of the record on appeal.

The answer of the United States (Transcript of Record, printed page 55) shows that all the facts upon which the orders complained of were based are embraced within the Commission's report. Respondent says:

"Further answering the said petition, respondent alleges that the matters and things alleged therein and sought to be put in issue were all before the Interstate Commerce Commission, and were fully heard and determined by it. They were within its power and authority to hear and determine under the provisions of the Act to Regulate Commerce. *In its report in writing with respect thereto*, made after a full hearing and investigation and after due notice to all of the parties, which states its conclusions, together with its decision, orders or requirement in the premises, *the matters and things of which complaint is made were fully considered and foreclosed by findings of fact; based on substantial evidence.*"

### III.

**The Facts Found with Respect to the Rate Order Do Not, as a Matter of Law, Support the Order Fixing Rates, and the Commission was without Jurisdiction to Make that Order.**

The jurisdiction of the Commission to make the rate order depends upon the unreasonableness of the rate which had been charged by the carriers. This is not a case in which the carriers are seeking to increase the rate. The presumption of right conduct attaches to the rate which the carriers had in effect, and the burden is upon those who seek to show that the rate in effect was unreasonable. It is not sufficient to sustain the jurisdic-



tion of the Commission, that the 80-cent rate or the 90-cent rate which the Commission fixed may be reasonable or might have been reasonable if established by the carriers. The Commission must go further, and its jurisdiction must be supported by a finding upon reasonable principles that the \$1.00 rate is an unreasonable rate. There is a difference between the weight of fact necessary to confer jurisdiction upon the Commission to change the rate, by showing that the rate in effect is unreasonable, and the weight of fact necessary to sustain the reasonableness of the rate fixed by the Commission, when once its jurisdiction has been established. The investigation in the former case is essentially judicial in its nature. The fixing of a rate for the future is a legislative act.

We do not merely contend that all of the findings must be taken as a chain to support the order, and that the breaking of the inference as to any link or finding destroys the whole; we contend that the findings of fact made in the report are, as they are shown by the answer of the United States to be, all of the facts upon which the Commission based its orders; and we contend that those findings of fact, whether taken singly or in groups or as a whole, do not afford any inference supporting or tending to support a conclusion that the rate of \$1.00 is an unreasonable rate, and that, therefore, the Commission was without jurisdiction to make the order as to the coal rates.

The report of the Commission (Record, printed pages 62, 63) first dismisses as without probative value the

mass of irrelevant statistics offered by complainants, and then the Commission clearly and expressly sets out the findings of fact upon which its conclusion and orders were based. We have in our original brief (pages 4-11) set out in full the Commission's four findings of fact with reference to the coal rates. And the analysis of those findings of fact made in our original brief (pages 41-50) shows that those facts do not support or tend to support a conclusion of unreasonableness or an order of the Commission based upon the unreasonableness of existing rates.

The analysis of the *Florida East Coast Railway case*, *supra*, shows that the Commission in the present case did not have nearly as much upon which to base a conclusion of unreasonableness as it had in that case. This court set aside the order of the Commission in the Florida East Coast Line case. The Commission in the present case, as it did in the Florida East Coast Line case, has simply gotten out of the realm of legitimate regulation, and has endeavored to constitute itself the general manager and the traffic manager of the railroad.

Just as in the Florida East Coast Line case, it was apparent that the real basis of the Commission's order was a supposed change in conditions which this court found did not exist or was not proven, so in the present case it is apparent that the real basis of the Commission's decision as to the Nashville Coal Rate is, that in the Commission's opinion (Record, printed page 66) there *ought to be* at Nashville as keen railroad competition as there is at Memphis, and this regardless of the fact that the

short line of the Frisco from the Alabama fields, which the Commission finds to be controlling at Memphis, does not exist at Nashville, and there is not shown to be any corresponding competition at Nashville, according to the Commission's own report. This court has repeatedly said that competition to be effective upon rates must be actual and controlling, and not merely conjectural. The Commission is attempting to create competition at Nashville by administrative fiat.

In the case of *Mount Pleasant Fertilizer Company, et al., v. Louisville & Nashville Railroad Company*, No. 6186, before the Interstate Commerce Commission, which was decided on July 31, 1914, Unreported Opinion A-748, the Commission sustained a rate of \$1.40 per ton from these same Kentucky mines to Mt. Pleasant, Tenn., 57 miles south of Nashville, and dismissed the complaint. In that case the Commission found that the rate of \$1.10 to Memphis was a *compelled* rate to meet the competition of carriers bringing coal into Memphis from mines in Alabama, and that in this respect the conditions at Mt. Pleasant are dissimilar to the conditions existing at Memphis, and the Commission found that the rates to Memphis are also influenced by the fact that Memphis is situated on the Mississippi River, and said that the effect of this water competition had been recognized by the Commission in numerous cases, and that traffic moving to Mt. Pleasant is not affected by competition of this kind.

It is clear, therefore, that the Commission does not consider the rate to Memphis as the proper standard by which to measure the rate to a non-competitive point, or

to a point where the conditions are dissimilar to those which exist at Memphis. It is equally clear that in order to make the comparison with Memphis in the Nashville case, the Commission substituted for the actual circumstances and conditions at Nashville (Record, page 66) a possible or conjectural competition which did not exist, but which the Commission thought *ought* to exist; that is the Commission seeks to create by fiat that which does not exist as a fact. This is the same effort which was made by the Commission in the old Nashville Coal Case, and which was condemned by the United States Court in that case. *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 73 Fed. 409. The proposition may be newly garbed, but it is the same old proposition.

But even if the opinion of the Commission that there *ought to be* equally as keen railroad competition at Nashville as at Memphis were relevant, there is nothing to sustain that opinion, and that opinion is directly contradicted as regards the traffic in controversy by the Commission's own findings of fact.

The Commission says (Record, page 69):

"The Illinois Central does not reach Nashville. Its rails from Western Kentucky extend only about half way, and the traffic is turned over to the Tennessee Central at Hopkinsville, Ky. This route is 58.5 miles longer than the Louisville & Nashville, from the same field, and 27 miles in excess of the Nashville, Chattanooga & St. Louis haul from East

Tennessee and Alabama. Besides it embraces two separate and distinct carriers. Furthermore, little attack was made on this rate, complainants confining themselves almost entirely to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis rates. Under all the circumstances, we can not find, upon this record, that the Illinois Central-Tennessee Central rate is unreasonable."

Appellants are the shortest and, therefore, naturally the rate-making lines on coal to Nashville. In the face of this fact, it can not reasonably be said that there ought to be equally as keen railroad competition at Nashville as there is at Memphis.

The Commission has not been consistent in its holdings as to rail competition at Nashville. In the case of *Bowling Green Business Men's Protective Association v. Louisville & Nashville Railroad Company*, 24 I. C. C. 288, 238-239 (*L. & N. R. R. v. U. S., et al.*, No. 280, October Term, 1914, Supreme Court), the Commission dismissed as of no effect against appellant, Louisville & Nashville Railroad Company, rail competition at Nashville, with respect to traffic as to which said appellant is not the rate-making line. In the present case, the Commission seeks to establish arbitrarily controlling competition on coal from the Western Kentucky fields as to which said appellant is the natural rate-making line, its route being 58.5 miles shorter than that of its competitors the Illinois Central and Tennessee Central (Record, page 69).

The Commission finds (Record, p. 65) that a rate not lower than \$1.40 to Memphis resulted from water competition of the Mississippi River. Therefore, a rate to Memphis even as low as \$1.40 could not be used as a standard to measure the Nashville rate. *A fortiori*, the lower rate compelled by the Frisco competition can not be so used.

And the same inconsistency exists with respect to the comparisons which the Commission seeks to institute between the Nashville rate and the Louisville rate. Inasmuch as the Louisville & Nashville is the rate-making line to Nashville from the Western Kentucky coal fields and the shortest competing line, Illinois Central-Tennessee Central, is 58.5 miles longer, and the Commission was unable to find that a rate of \$1.00 via the Illinois Central-Tennessee Central is unreasonable (Record, p. 69), Nashville is, as far as coal from the Western Kentucky mines is concerned, practically a local station on the Louisville & Nashville Railroad. In the case of *Lebanon Commercial Club v. Louisville & Nashville Railroad Company, et al.*, 28 I. C. C. 301, which was decided by the Commission less than two months before its decision in the present case, complaint was made of rates via the Louisville & Nashville Railroad Company from the Tennessee and Virginia coal fields to Lebanon, Ky., as compared with the rates to Louisville, Ky. From the table of comparative rates shown on page 302 of the Commission's report, the following comparisons may be taken as illustrative:

From Jellico, Tenn., to Lebanon, Ky., the rate  
on all grades of coal was.....\$1.20

From the same point of origin to Louisville, Ky.,  
the rates were—

On slack or nut and slack mixed .....	.75
On run-of-mine .....	.85
On other grades .....	.95

The geographical situation of Lebanon and of Louisville appear from map filed with our reply brief with respect to that part of the order as to switching practices which requires the Louisville & Nashville Railroad Company to switch the competitive coal shipments of the Tennessee Central Railroad Company. The distance to Lebanon from Jellico is 67 miles less than the distance to Louisville from Jellico (28 I. C. C. 301), and coal for Louisville goes right by Lebanon.

In the Lebanon Coal Case, the Commission refused to hold the higher rates to Lebanon unjustly discriminatory as compared with the lower rates to Louisville, Ky., although Lebanon, Ky., is an intermediate point, 67 miles nearer to the mines than is Louisville. We quote from the report of the Commission in the *Lebanon Coal Case*, 28 I. C. C. 301-304, as follows:

“The petitioner, an organization of those interested in furthering the common interests of Lebanon, Ky., and of its vicinity, attacks the rate on bituminous coal to Lebanon from Big Stone Gap, Stonega, and Norton, Va., and from Cotula, Jellico and Habersham, Tenn., as unjust and unreasonable *per se*. As a second ground of complaint it says that rates from these points to Louisville vary according to the grade

of coal shipped whether (a) slack, or nut and slack mixed, (b) run of mine, (c) all other grades of coal; whereas to Lebanon the one rate governs the carriage of coal of all grades, to the consequent disadvantage and prejudice of that city. The third ground of complaint is that the rates from points of origin in the States of Virginia and Tennessee to Lebanon are greater in the aggregate, than the rates for the transportation of like grades of coal from the same sources, over the same lines of railroad and in the same direction to Louisville (67 miles beyond Lebanon), the haul to Lebanon being included within the haul to Louisville, all in violation of the third and fourth sections of the act. \* \* \*

"The table following shows comparatively the rates here in question, in cents per net ton of 2,000 pounds, on bituminous coal:

FROM	To Lebanon. Ky. on all grades	To Louisville, Ky.		
		Slack or nut and slack mixed	Run of Mine	Other Grades
Stonega, Va . . . . .	140	95	105	115
Big Stone Gap, Va . . . .	130	85	95	105
Norton, Va . . . . .	130	85	95	105
Jellico, Tenn . . . . .	120	75	85	95
Cotula, Tenn . . . . .	125	75	85	95
Habersham, Tenn . . . .	125	75	85	95

"Defendant further showed, taking the rates from Jellico as illustrative, that Lebanon has precisely the same rate as similarly located points in Kentucky, and that no such point has a rate lower than that to Lebanon. Another showing by defendant indicates that these rates furnish no higher return than do other rates in this territory by way of other railways. \* \* \*



\* \* \* "The Commission is forced to agree with the contention made by the Louisville & Nashville in its brief that complainant bases its entire case upon the issue of comparative unreasonableness. \* \* \*

\* \* \* "The Commission finds the record quite bare of anything that will enable it to determine the extent to which the Lebanon rate should be allowed to exceed the Louisville rate. It must also be remembered that any change which may be made in the existing differentials will necessarily reflect into the rates to other Louisville & Nashville points, intermediate, as is Lebanon, to Louisville. \* \* \*

"The Louisville market appears to be controlled by the movement of coal by river at a very low transportation cost, and by the movement of coal from Western Kentucky mines at a rate of 60 cents per ton by the Illinois Central Railroad. These conditions appear to compel the Louisville & Nashville to make a low rate to Louisville on slack coal and on nut coal and slack coal mixed, but permits a somewhat higher rate on other grades.

"An examination of the tariffs of the Louisville & Nashville Railroad Company discloses that Lebanon, in this respect, is in no different position from the other local Louisville & Nashville points. Also, the present rates to Lebanon appear to be so constructed as to equalize the former refund on steam coal. On this record the Commission can not say that the present graded rates to Louisville result in unjust discrimination against Lebanon.

"In accordance with the conclusion announced herein, the petition will be dismissed."

Surely if rates varying from \$1.20 per ton to \$1.40 per ton for shipments of bituminous coal from the Eastern Coal fields on the Louisville & Nashville to Lebanon are not unreasonable as compared with the rates to Louisville, Ky., and if no similarly located points in Kentucky

have a lower rate than that to Lebanon, and if these rates furnish no higher return than do other rates in this territory by way of other railroads, and if the tariffs of the Louisville & Nashville Railroad Company disclose, as the Commission says they do, that Lebanon in respect to graded rates is in no different respect from the other local Louisville & Nashville points, while the different conditions which exist at Louisville result in different practices at that point, the rates to Louisville, Ky., can not be even remotely connected in any way with the rates to Nashville, Tenn., which, as far as coal rates are concerned, is substantially a local point on the Louisville & Nashville Railroad.

In its report in the present case (Record, p. 67), the Commission refers by way of rebuttal of certain transportation costs stated in this case to its findings in the case of *Slider v. Southern Railway Co.*, 24 I. C. C. 312, 313. Appellants were not parties to that proceeding, and were not even remotely concerned in the issues therein. The Commission will probably justify its use of its finding in that case (as to the merits of which we know nothing), by the stipulation referred to on page 6 of interveners' brief that "*any record in the office of the Commission might be considered in this case.*" If such be the case, appellees can not object to our treating as part of the record in this case the findings and conclusions of the Commission in the Mt. Pleasant Case and in the Lebanon Coal case, which we have cited, or in the last Nashville Switching case which we shall hereafter refer to in connection with the switching order.

The Memphis Coal Case, *Memphis Freight Bureau v. L. & N. R. R. Co.*, 26 I. C. C. 402, is also referred to in the Commission's report in the present case (Record, p. 65). And counsel for the Interstate Commerce Commission say (page 15 of their brief) "the record in that case was made a part of the record in this case. The judges were furnished with a copy of that report, dated December 3, 1912."

It appears from the testimony of Mr. Geo. W. Lamb (Record, pp. 78-80) that he testified in the Memphis Coal Rate Case, and that it was shown by exhibit filed by him in that case, and it is true, that in spite of the increased tonnage handled in the equipment of the Louisville & Nashville Railroad Company, and in spite of the increase in the tractive power of engines, and in spite of the increased volume of tonnage, and in spite of all other circumstances tending to increase the efficiency of operation, the increased costs of labor and material have been so great that the cost of earning a dollar of revenue on the lines of the Louisville & Nashville Railroad Company, or operating expenses, increased from 60.43 cents in 1888 to 71.92 cents in 1911, and Mr. Lamb filed with his affidavit, a statement showing the results of operation of the Louisville & Nashville Railroad Company during the 33 years from July 1, 1878, to June 30, 1911, inclusive, and said that this statement is substantially the same as the statement showing similar information filed by him in the Memphis Coal Case, and marked Exhibit G. W. L. No. 40, in that case. This statement will be found opposite page 80 of the printed record herein. The report of the Com-

mission in the *Memphis Coal Rate case* shows, 26 I. C. C. 402, 405, that "voluminous exhibits, statistical and otherwise, were filed by defendants tending to show the cost of operation since 1901." The statement in the Commission's first finding of fact (Record, p. 64) that little more than a suggestion of increased cost of labor and material appears of record is irreconcilable with the statement made by the Commission in the *Memphis Coal Rate Case*, that voluminous exhibits, statistical and otherwise, were filed by defendants tending to show the increased cost of operation.

Standing alone, the increased tonnage capacity of cars, the increased tractive power of engines, and the increased volume of tonnage handled, stated in the Commission's first finding of fact, would not, as we submit we have shown in our original brief (pages 44-47), have afforded any inference as to the unreasonableness of the old rates, even if little more than a suggestion of increased cost of labor and material had appeared of record. When considered in connection with the Commission's report in *Memphis Coal Rate Case*, *supra*, and in connection with the affidavit of Mr. Lamb and with the statement made a part thereof, the Commission's finding of fact tends, if it tends either way, to justify an *increase* in the rates. No inference whatever can be drawn from that finding to justify a reduction in the lowest rate which was in effect at any time during the 25-year period.

There remains for consideration as to the rate order only the Commission's fourth finding of fact which we have set out in full and have analyzed and discussed in

pages 11, 43, 44, 48, 49 and 50 of our original brief herein. If there was no evidence to support the order of the Commission in the *Florida East Coast Line Case*, *supra*, there is surely nothing in the fourth finding of fact to support the order of the Commission as to coal rates in this case. The average earnings per car on oranges from—

Florida points were found to be (14 I. C. C. 489-490) in excess of.....\$188.80

The average earnings per car found for the coal traffic here in controversy were (Record, page 68):

For the Louisville & Nashville .....	41.00
For the Nashville, Chattanooga & St. Louis,	34.50.

It is beyond the compass of the human mind to draw from these facts an inference that the rates in controversy in the East Coast Line Case were reasonable rates and the rates here in controversy are unreasonable rates. With the same rate and with an assumed greater tonnage (41 tons as against 40 tons), the revenue per car mile for the line of the Louisville & Nashville, 58.5 miles shorter than the Illinois Central-Tennessee Central lines, is *necessarily* greater than the earnings per car mile of the latter line, but no inference can be drawn from that fact. The longer line necessarily has to meet the rate of the shorter line if it desires to compete for the business. In the *Florida East Coast Line Case*, as we have herein-above shown, the revenue per car mile up to the base point, Jacksonville, for an average haul nearly twice as great as the average haul of the Louisville & Nashville

herein involved, was more than twice as much as the revenue per car mile on the same traffic beyond Jacksonville.

*There is not even a serious pretense of any finding to support the order as to the coal rates of the Nashville, Chattanooga & St. Louis Railway.*

Congress has not given to the Commission any such powers as the Commission is seeking to exercise with respect to the coal rates in this case. The carriers retain the primary right to make rates, and the presumption of fair dealing applies to the rates which the carriers have made. The Commission has not been constituted a general traffic manager for the railroads. If the Commission can do, as it is seeking to do with reference to appellants' coal rates in this case, it can make or break, not only the carriers but communities at its pleasure, and with respect to the important question of rate regulation, which touches every citizen, this will cease to be a government of laws and will become an autocracy of a Commission composed of seven men.

## IV.

**The Facts Found with respect to the Order as to Switching Practices do not as a matter of Law Support that Order, and the Commission was without Jurisdiction to make the Order as to Switching Practices.**

The facts found by the Commission as to the Nashville Switching situation are set out in full in pages 12 to 14, inclusive, of our original brief as the Commission's fifth finding of fact. Those facts, and the jurisdiction of the Commission based thereon, are discussed in pages 55 to 68, inclusive, of our original brief. Since our original brief was written there have come to our attention, the decision of this court in *Pennsylvania Company v. United States*, No. 591, October Term, 1914, decided February 23, 1915, and the report and order of the Interstate Commerce Commission in the Nashville Switching Case, *City of Nashville v. L. & N. R. R. Co.*, 33 I. C. C. 76, and we have filed a reply brief with respect to that part of the order as to switching practices which requires the Louisville & Nashville Railroad Company to switch the competitive coal shipments of the Tennessee Central Railroad Company.

In view of the stress which has been laid upon the definition of the term "Transportation," we show as part two of the appendix to this brief certain abstracts from the debates on the Hepburn Bill, from which it appears that in extending the limits of the term "Transportation," Congress had no idea whatever of abrogating the proviso of the Third Section of the Act to Regulate Com-

merce that no common carrier should be required to give the use of its tracks or terminal facilities to another carrier engaged in like business. The abstracts which we have made, and we submit, the entire history of the legislation extending the definition of the term "Transportation" show that the purpose of this extension was to empower the Interstate Commerce Commission to prevent those unjust discriminations and preferences which might arise through the ownership by shippers or receivers of freight of the facilities of transportation. Since our original brief in this case was written, the Commission has made its report *in re Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway and other carriers*, 33 I. C. C. 168, and in response to question No. 9 of the Senate Resolution, pursuant to which the Commission made its report, the Commission sets forth at pages 201 to 204, inclusive, a review of the very Nashville switching situation which we have here under consideration. Question 9 of the Senate Resolution called for "any fact of facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway or any railroad terminal or terminal company, steamboat or steamboat lines, upon the Cumberland and Tennessee rivers and any dock or dock yards at Pensacola, New Orleans, Mobile or other seaport establishes a monopoly and restricts competition and determines and fixes rates." Question No. 9 of the Senate Resolution relates to matters purely within the purview of the Anti-



Trust Act. It does not concern the provisions of the Act to Regulate Commerce. Certainly the proceedings and demands of the Commission pursuant to the Senate Resolution were not conducted under authority of Section 12 of the Act to Regulate Commerce, *United States v. Louisville & Nashville Railroad Company*, No. 499, October Term, 1914, decided by this court February 23, 1915. It is clear we think from these facts, as well as from the reference made by the Commission in its report herein (Record, page 71), to the Terminal Railroad Association Case, that the Commission in the matter of switching at Nashville is endeavoring to administer questions arising under the Anti-Trust Act and not under the Act to Regulate Commerce, and the authority of the Commission is limited by the latter act.

But, even if the Commission had the power to administer the Anti-Trust Act, it could have no cause for complaint under that Act against the switching practices of appellant at Nashville. If appellants were required to "unscramble" their terminal arrangements at Nashville, such a course would tend to restrict or destroy competition which is afforded under the present arrangement, would in nowise increase competition, and would burden and not in any way benefit the shippers and receivers of freight at Nashville. For example, if appellants were required to separate their terminals, the shippers and receivers of freight now located on the joint terminals would have to pay switching charges which they do not now have to pay, and might lose altogether switching privileges which they now enjoy with-

out cost, and there would be no increase of benefit to the shippers and receivers of freight located on the lines of the Tennessee Central or on any other lines in Nashville. If the rate on non-competitive traffic, under the new arrangement, should remain the same, a shipper of non-competitive freight located on that part of the present joint terminals which might be distributed to the Louisville & Nashville Railroad Company, would pay on property going out over the Nashville, Chattanooga & St. Louis Railway, on which no switching charge whatever is now assessed, the switching charge of \$3.00 in addition to the rate which he now pays. The change would not in anywise tend to increase competition, but would simply increase the burden of the Nashville shippers.

The Louisville & Nashville Terminal Company, one of the companies against which the order as to switching practices was made, is not an operating company. It operates neither tracks nor engines and it does not do switching for any one. The Commission is clearly without jurisdiction to order that company, as it does in the order complained of, to switch for other companies.

The Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway do not switch for each other. Each operates as a part of its own tracks or terminals:

- (a) Tracks which it owns in fee;
- (b) Tracks which it leases jointly from the terminal company; and
- (c) The tracks of the other company over which it has trackage arrangements.

Each of these companies is to all intents and purposes the owner and operator for its own account of all of the joint facilities involved.

There is no switching charge in effect between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway on either competitive or non-competitive traffic.

As stated by the Commission in its report in the case of *City of Nashville v. Louisville & Nashville Railroad Company*, 33 I. C. C. 76, 80-81, with respect to the Nashville Terminal arrangement:

“The arrangement is called the ‘Nashville Terminals’ and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each. The association is not incorporated and is not a terminal company in the sense that the principal purpose of its existence is ‘to furnish terminal facilities for carriers which lack them.’ It is a joint agency voluntarily constituted by the Louisville & Nashville and Nashville, Chattanooga & St. Louis for the joint maintenance and operation of their own facilities for their own use. The terminal tariffs of both roads publish service by the Nashville Terminals, and provide that ‘there is no switching charge from locations on tracks of the Nashville Terminals within the switching limits on freight traffic, carloads, from or destined to Nashville’ over either road, ‘regardless of whether such traffic is from or destined to competitive or non-competitive points.’ ” (Italics are ours.)

We respectfully submit that any order based, as is the present order as to switching practices, upon the view that unjust discrimination *under the Act to Regulate Commerce* can arise from the joint maintenance and operation by two companies of their own facilities for their own use, is an order which the Interstate Commerce Commission is without power to make.

Respectfully submitted,

HENRY L. STONE,

WM. A. COLSTON,

*Solicitors for Appellants.*

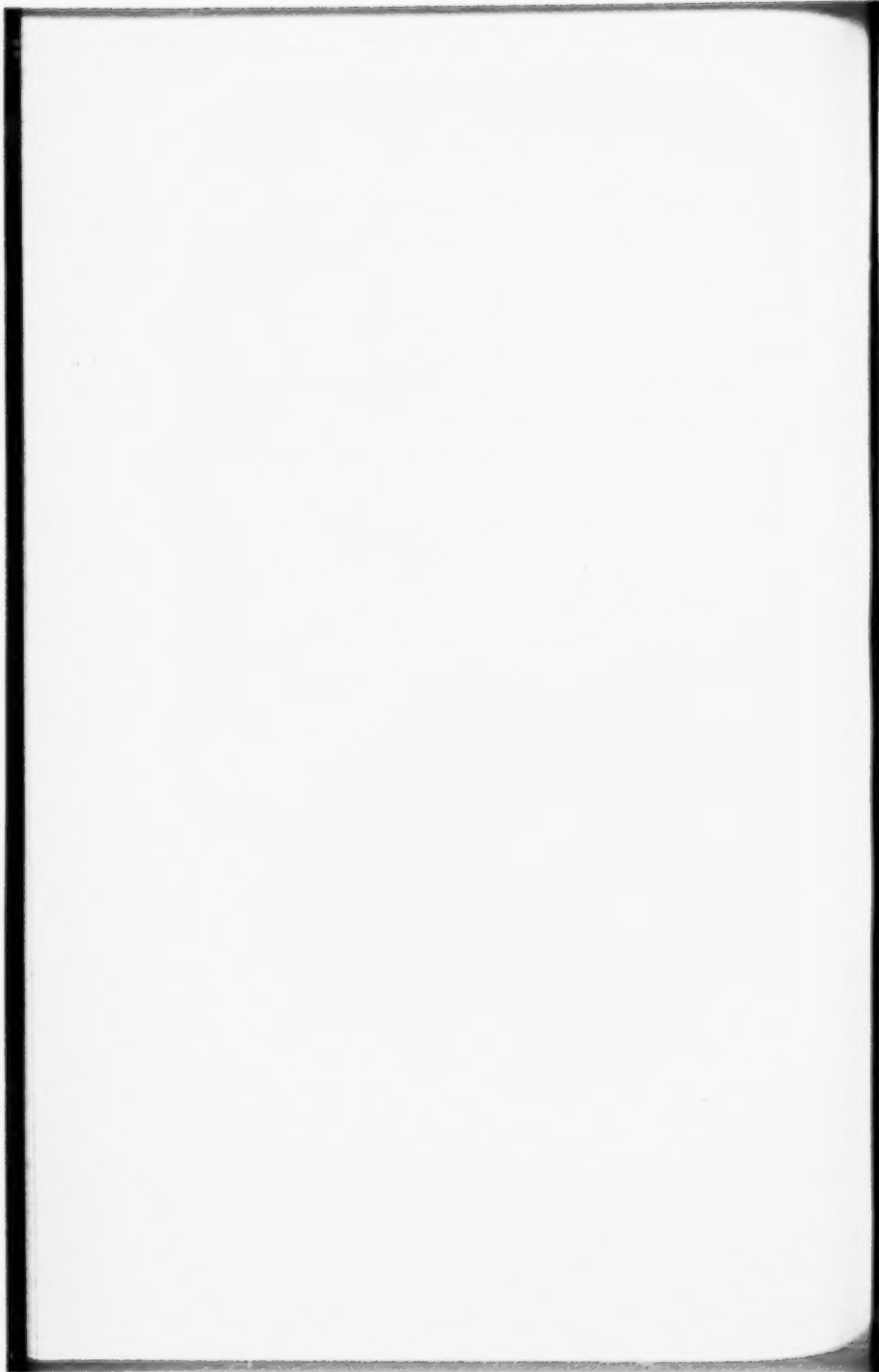
CLAUDE WALLER,

JNO. B. KEEBLE,

WM. A. NORTHCUTT,

*Of Counsel.*

March 17, 1915.



## APPENDIX.

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### PART I.

**Extracts from the Debates on the Hepburn Bill which Show that Congress Has Not Changed the Rule as to Review of the Commission's Findings of Fact by the Judicial Power of the Government, and that the Conclusions of the Interstate Commerce Commission are Subject to Judicial Review.**

### PART II.

**Extracts from the Debates on the Hepburn Bill which Show that the Amendment of Section 1 of the Act to Regulate Commerce, Defining the Term "Transportation" was Intended to Prevent Unjust Discrimination which Necessarily Arises from the Ownership and Control of Facilities of Transportation by Shippers and Receivers of Freight.**



**PART I.**

**Extracts from the Debates on the Hepburn Bill which Show that Congress Has Not Changed the Rule as to Review of the Commission's Findings of Fact by the Judicial Power of the Government, and that the Conclusions of the Interstate Commerce Commission are Subject to Judicial Review.**

The extracts are from Volume 40 of the Congressional Record covering the debates of the first session of the 59th Congress from February 26th to April 7, 1906.

**Judicial Review of Commission's Orders.**

(Page 3538) Senator Scott, March 7, 1906:

"I realize, however, that there is a demand that the Interstate Commerce Commission should be given authority in the matter, and that power will probably be given it to fix rates when conditions require it. I am opposed to giving them that power, certainly without a provision for a broad and general court revision, to which the shipper and carrier can appeal when the rate designated is unfair to either. I hold to such a revision in the court since the history of the Interstate Commerce Commission has shown to my mind that the power of the court to review their decision has simply saved this country from the experience of European countries."

(Page 3539) Senator Bailey, March 7, 1906:

"It occurs to me that if it is an inherent right of a court to hear, and pending final determination, to suspend the enforcement of the rates, and if it is a right of the carrier to have the rate suspended, you



concede something to the force of the contention which I have just indicated when you require the carrier to deposit a bond or money in the court until the proper and final disposition of the case."

(Page 3793) Senator Culberson, March 13, 1906:

"But, Mr. President, when interrupted, I was speaking with reference to what ought to go into this bill with respect to the right of judicial review. I have said that, in my opinion, it is unnecessary to incorporate such a provision, but that it would be harmless if incorporated. I desire to say now that if the bill undertakes affirmatively to limit or deny the constitutional right of review, that provision of the bill would be void, although the other part of the act might stand and be effective."

(Page 3987) Senator Dolliver, March 16, 1906:

"I agree with what the Senator says about the difficulty involved in retaining the equity jurisdiction of the Circuit Court of the United States, and I say that no provision has been attempted to limit or abridge the equity powers of the courts solely for the reason that it was the opinion of those who were interested in framing the bill that such a provision would introduce an uncertain constitutional element into the situation."

(Page 3991) Senator Knox, March 16, 1906:

"I stated that there ought to be a court provided. I think that is really the only difference between the Senator from Iowa and myself, barring one or two little details, which have not been referred to. I think he and I could agree on this question of court review. As I understand, the Senator from Iowa (Mr. Dolliver) and the Senator from Minnesota (Mr. Clapp) made a similar statement the other day dur-

ing his speech on the floor of the Senate, and Mr. Hepburn made the same statement on the floor of the House on the day the bill was passed, which is that they recognize the power of the Circuit Court to entertain suits to set aside the orders of the Commission; *that they recognize that that power is an unrestricted power.* Now, I say the only difference between them and myself is—and my views are set out in the fifth section of the bill I offered—that I agree that the court has power, but I am in favor of restricting that power in the interest of the public by requiring a cash deposit or the deposit of a bond so as to prevent frivolous appeals to the court.”

(Page 4090) Senator McCreary, March 20, 1906:

“I agree with the senior Senator from Texas (Mr. Culberson), who said in his very able and interesting speech: ‘As the grounds of judicial interposition are constitutional, there is in my judgment no necessity for embodying the right of judicial review in this bill. The right of judicial review exists by virtue of the Constitution, and a statute may not add to or subtract from it.’ ”

(Page 4421) Senator Spooner, March 27, 1906:

“It is the function of the Supreme Court and the inferior courts to secure to the citizens the guaranties of the Constitution of life, liberty and property. It certainly could not have been in the contemplation of the framers that their power to discharge this function should be exercised in given cases not according to the judgment of the court, but according to the legislative will.”

(Page 4426):

“Congress may withhold, or might have withheld jurisdiction from the Circuit courts in certain cases. They did it for many years, and we may admit they

may now withhold jurisdiction from the Circuit and District Courts; but, Mr. President, so long as they do not deprive the court of jurisdiction, so long as looking into the statute the court can see that it is given jurisdiction of the subject-matter, Congress can not be permitted on principle—a principle which this people never must suffer to be invaded or abrogated—to dictate to the court the manner in which it shall exercise this judicial power. That would emasculate the courts of justice; that would be to obliterate the line which the Constitution has drawn between the co-ordinate and independent branches of the Government. Under that theory the judicial department of the Government would cease to be an independent department of the Government, and a blow would be struck at the best work of the fathers.”

(See Senator Spooner’s speech, pages 4421 to 4433.)

(Page 4378) Senator Teller (Col.), March 26, 1906:

“The President of the United States, as has been said today, has sent us two messages. In both he outlined the same thing—a rate-making by the Commission whenever the Commission shall determine that the rate made by the railroad is not proper; a review by the courts; and the President says this rate is to stand until the court shall suspend it or, in other words, declare that the Commission has made a mistake. There is the issue before the country. I do not believe the railroad people are especially controverting this question, except to insist that they shall have their day in court, and nobody, I repeat, wants to pass a law that does not give them their day in court.”

(Page 4417) Senator Overman (N. C.), March 27, 1906:

“But I want to say right here, let the courts of the land be open at all times to the rich and poor

alike, to the individual and corporation, and let justice be administered freely, completely and without delay; but the point I make is this, that the amendment suggested will in nowise abridge or limit the right of the railroad, the shipper or any one else. It is only a limitation upon the procedure and practice of the courts when injunctive relief is sought in this particular case. Limit as to the time when, the place where, and the notice to be given is no limitation upon the constitutional or any other right the petitioner or complainant might have."

(Page 4424) Senator Rayner (Maryland), March 27, 1906:

"If you pass a law here and have no court to review the decision, so that you can not execute the fifth amendment, that law would be void. That is an answer to the question. The law itself would be void. For instance, if there is no court now in existence with any right to review the order of the Interstate Commerce Commission under the Hepburn bill, then the very law proposed to be passed here would, under the Minnesota case, be void."

(Page 4485) Senator Knox (Pa.), March 28, 1906:

"I have no hesitation in saying, upon the authority of the cases which have already been submitted to the Senate by the distinguished Senators who have participated in this debate, that a bill drawn upon the theory that the orders of the Commission shall be final and assailable in the courts would be unconstitutional. (Citing and quoting from *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 592; *C. M., etc., R'y v. Tompkins*, 176 U. S. 172; *C., M. & St. P. R'y Co. v. Minnesota*, 134 U. S. 458.)

And again at page 4486:

"I desire to draw special attention to the fact that the question that can be submitted to the deter-

mination of the court is solely the question as to whether the order violates the rights of the party who institutes the proceedings. There is no attempt to define what those rights are. There is no attempt to expand or to contract them. It is the heritage of every English-speaking man or association of men to have his rights determined in a court. It is for the court to decide what those rights are. An attempt to specify what right shall be determined by the court might be fatal to the constitutionality of the legislation. If the specification should not include all his rights, he would be shorn of a constitutional privilege. Should it undertake to enumerate rights which he could not establish, it would be meaningless and unintelligent legislation."

On the same page Senator Knox again said:

"Mr. Hepburn, in closing the debate in the House (Record, p. 2651), replying to a question of Mr. Sullivan, of Massachusetts, stated there was no doubt of the power of the court to review the reasonableness of a rate fixed by the Commission. I quote from the Record:

" 'Mr. Sullivan, of Massachusetts: Then, in your opinion, the court, under this bill, if it becomes a law, will have the right to enjoin a rate fixed by the Commission if it is unreasonably low, but yet does not amount to confiscation?

" 'Mr. Hepburn: I think there is no doubt about that.' "

(Page 4867) Senator Stone (Mo.), April 5, 1906:

"It follows, then, that if the Commission should adhere to an order which a carrier might deem to be unjust and unreasonable, the controversy must be settled in the courts. It must be settled in the courts because there could be no other forum for settling it. I can hardly believe that any Senator would deny

jurisdiction to the courts to hear and determine controversies of that character, even though he believed that Congress had power to deny it. If that be true, Mr. President, as I am sure it is, then it is useless to discuss the question as to whether Congress could, by affirmative enactment, place the orders of the Commission above and beyond the reach of the courts. There is no use talking about something nobody wants to do, and which many think can not be done."

## **PART II.**

**Extracts from the Debates on the Hepburn Bill which Show that the Amendment of Section 1 of the Act to Regulate Commerce, Defining the Term "Transportation" was Intended to Prevent Unjust Discrimination which Necessarily Arises from the Ownership and Control of Facilities of Transportation by Shippers and Receivers of Freight.**

On January 31, 1906, Representative Campbell, of Kansas, said (Congressional Record, Vol. 40, Part 2, p. 1828):

"The irresistible result and the logical effect of conceding to large shippers the right to use their own facilities is the creation of monopoly, which is always dangerous to the public welfare."

And on February 2, 1906, Mr. Goulden said (40 Congressional Record, Part 2, p. 1961):

"The bill that passed last Congress, and against which I had the honor of casting my vote, was exceedingly objectionable. The provision creating a special court with its heavy expenses, the failure to

reach the private-car and terminal-charge evils, caused the Senate to refuse last year to consider the action of this body. The thousands of private cars of the meat, fruit and other trusts dictated terms to the railroads and compelled compliance with their demands.

"The same is equally true of the terminals. With the indulgence of the members of the House, allow me to give a few of the many cases familiar to the country:

"The Union Pacific Railroad Company, of Pittsburgh, Pa., less than 10 miles in length and connecting the great plants of the Steel Trust at Homestead, Braddock and Duquesne, secures an average of one-third of the freight charges on all freight entering or leaving from all points in the United States.

"The Monongahela and Southern Railroad Company, of Pennsylvania, one mile in length, connecting the works of Jones & Laughlin, of the southside, Pittsburgh, with the Baltimore & Ohio, the Pennsylvania Lines and the Lake Erie roads, secures one-fourth or more of the freight charges to all points in the country, exacted as tribute from the railroads mentioned."

And Mr. McCall said (p. 1969):

"The private car, refrigerator car, the industrial switch, receiving a part of the through rate as if it were an independent line, every instrument of favoritism and injustice, had justly received public condemnation."

And on February 7, 1906, Representative Wiley, of Alabama, repeated what he had said a year previously (Congressional Record, Vol. 40, Part 3, p. 2241):

"It is an open secret that men like Rockefeller and Carnegie, by means of their side tracks and pri-

vate terminal facilities, have been able to secure such low rates for the carriage of their stupendous volume of freights as not only to undersell all competitors, but to destroy all competition as well.

"There are numerous business concerns in all sections of the country having several miles of private side tracks, switching privileges and terminal facilities. I have not time to enumerate them. These accommodations, by whatever name called, enable the owners to secure special rates, which are but a subterfuge, device or scheme to cover up and hide from the eyes of the public unjust rebates. They obtain a division of freight on all cars delivered to connecting roads by means of their private terminals, and receive compensation for services rendered which is unfair and excessive. These abuses can not be rectified until these terminal companies are placed under the control of the Interstate Commerce Commission."

And said further:

"The bill now under consideration does embrace within its provisions, and seeks to regulate them, the private-car and side-track evils, and in that respect, if in none other, it is a far better measure, more remedial and beneficial than the Esch-Townsend Bill."

On March 13, 1906, Senator Simmons said (Congressional Record, Vol. 40, Part 4, p. 3727):

"It is a well-known fact that within this time certain combinations have monopolized many of the prime commodities of industry and commerce, and, through the enormous volume of business they can give or withhold, aided by the devices of private switches, cars, refrigeration, ventilation and icing, have for some time past compelled, and today in



many instances compel the railroads to accept such compensation as they are willing to pay for the transportation of commodities in which they deal or for the traffic which they control.

“This control of the big shippers includes not only the oil and fresh-meat business of the country, but it extends to the fruit business, the dairy business, the truck business and the brewing business, as well as to other important lines of business.”

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

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LOUISVILLE & NASHVILLE RAILROAD COM-  
PANY AND NASHVILLE, CHATTANOOGA &  
ST. LOUIS RAILWAY, APPELLANTS,

v.

THE UNITED STATES, INTERSTATE COM-  
MERCE COMMISSION, CITY OF NASHVILLE,  
ET AL.

No. 673.

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Middle District of Tennessee denying an interlocutory injunction. The order of the Interstate Commerce Commission which is under attack related (1) to coal rates to Nashville, Tennessee, and (2) to switching practices thereat. The District Court refused an injunction to either branch of the order, and

it is submitted that its action in so doing was based upon familiar principles no longer open to debate.

The carefully reasoned opinion of the District Court (R. 83; 216 Fed. 672) and the no less carefully prepared report filed by the Commission in support of its order (R. 60) present the case with such fulness as to render prolonged discussion unnecessary.

#### **ARGUMENT.**

##### **I.**

**The granting or refusing of an interlocutory injunction is a matter in the sound discretion of the court, and is not to be reviewed unless this discretion has been abused. No such abuse here appears.**

The Commerce Court Act of June 18, 1910, 36 Stat. 539, 542, c. 309, sec. 2 (Judicial Code, sec. 210), limited the right of appeal from interlocutory orders to those granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission. The District Court Jurisdiction Act (Urgent Deficiency Appropriation Act of October 22, 1913, 38 Stat. 208, 220) extended the right of appeal to orders "granting or denying, after notice and hearing, an interlocutory injunction."

This enlargement of the right of appeal, however, in no way changed the fundamental rule that the granting, denying, or dissolution of an inter-

locutory injunction rests in the sound judicial discretion of the court of original jurisdiction; and where that court has not departed from the rules and practices of equity, established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that its discretion has been abused. The question is not whether or not the appellate court would have made, or would make, the order. *Bluffington v. Harvey*, 95 U. S. 99, 100; *Thompson v. Nelson* (C. C. A. 6th Cir.), 71 Fed. 339; *Vogel v. Warsing* (C. C. A. 9th Cir.), 146 Fed. 949; *American Grain Separator Co. v. Twin City Separator Co.* (C. C. A. 8th Cir.), 202 Fed. 202; *Samson Cordage Works v. Puritan Cordage Mills* (C. C. A. 6th Cir.), 211 Fed. 603. &

The case was made in the court below by the petition of appellants, the answers of the United States and the Interstate Commerce Commission thereto (in which were traversed all the substantive grounds for relief asserted in the petition), and sundry exhibits, to wit, the complaint filed before the Commission by the Traffic Bureau of Nashville, the separate answers thereto of the Louisville & Nashville Railroad Company and the Nashville, Chattanooga and St. Louis Railway, the report of the Commission, and the order complained of—the latter accompanied, of course, by all those presumptions of regularity with which the law surrounds it. There were also filed on

behalf of the petitioners the affidavits of Geo. W. Lamb and C. B. Compton.

The record of the hearings before the Commission containing the evidence upon which it acted, and by which alone the soundness of its conclusions of fact could be tested, was not adduced because of its "great size and volume." Indeed, not even that portion of it which contained the evidence of the witness Geo. W. Lamb was exhibited, but instead the rather extraordinary course was adopted of filing the affidavit of Lamb himself as to the substance of his previous testimony, or as to that portion of it (inconclusive here) having reference, not to the cost of transporting coal to Nashville, but to the cost of "earning a dollar of revenue."

It was sought to further buttress the petition by the affidavit of C. B. Compton, setting forth the fact, fairly obvious from a mathematical standpoint, that if the lower rate imposed by the Commission should be permitted to supplant the higher rate fixed by the carriers the amount to be collected by the carriers from the shippers would be correspondingly reduced. But there is no pretense, either in this affidavit or elsewhere, that the rate fixed by the Commission was so low as to be confiscatory.

It further appeared that notwithstanding the allegation of irreparable injury, and the consequent inducement to haste, the application for the

interlocutory injunction was deferred, with what seems studied care, until the very moment for compliance with the order had arrived.

On such a record, how can it be said that the withholding of an interlocutory order was an improvident exercise of judicial discretion?

## II.

**The order of the Commission declaring the coal rate unreasonable involves a question of fact, and is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence.**

That the reasonableness of a rate is a question of fact, and that the finding of the Commission thereon is conclusive unless it be without substantial evidence to support it or contrary to the indisputable character of the evidence, is firmly settled. In the language of this court itself, the doctrine has been announced with "tiresome repetition." *Illinois Central R. R. Co. v. Int. Com. Comm.*, 206 U. S. 441, 455; *Int. Com. Comm. v. Chicago & Alton R. R. Co.*, 215 U. S. 479; *Int. Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452; *Int. Com. Comm. v. C. R. I. & P. Ry. Co.*, 218 U. S. 88, 110; *Int. Com. Comm. v. Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235; *Int. Com. Comm. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294; *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314.

The petition filed in the District Court sets up the following grounds of attack upon the order in question (R. 9):

(a) The findings and orders made by the Commission were wholly without substantial evidence to support them.

(b) The findings and orders made by the Commission were contrary to the indisputable character of the evidence.

(c) The facts found by the Commission do not as a matter of law support the orders made by it.

(d) The Commission was without jurisdiction to make the orders.

(e) The enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law, and will result in the taking of petitioners' property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

Of these contentions the first two are expressly abandoned, both in the court below and in this court. As stated at page 25 of appellants' brief—

But appellants' contentions upon the motion for the interlocutory injunction were not based upon the allegation that the findings and orders of the Commission were wholly without substantial evidence to support them, or that the findings and orders made by the Commission were contrary to the indisputable character of the evidence, and, therefore, it was not, as it appeared to appellants, at all necessary in the determi-

nation of the motion for an interlocutory injunction that the transcript of the large record before the Commission be filed with or considered by the court.

This concession is fatal to appellants' case. Appellants seek, however, to modify its harmful effect by falling back upon what is in effect a mere criticism of the Commission's report, and by insisting, not that the findings and orders of the Commission are without support in the record of the cause, but that they are not adequately supported by those facts set forth in the Commission's report.

Appellants accordingly are pleased to confine themselves to a discussion of the report, by paragraphs, referring to the latter as "the Commission's first finding of fact," "the Commission's second finding of fact," etc. These paragraphs will be found upon analysis to present the following propositions, giving to them the numbers so assigned by appellants:

*First.* That the present coal rate to Nashville has been in force since 1888, a period of 25 years; and this, notwithstanding the fact that a comparison of the transportation and operating conditions during that period demonstrates that there has been a great improvement from the carrier's standpoint.

*Second.* That a comparison of the coal rate to Nashville with that to Memphis, after giving due



consideration to all legitimate factors of difference between them, demonstrates that the Nashville rate is unreasonably higher than the Memphis rate.

*Third.* That a comparison of the coal rate to Nashville with that to Louisville, after giving due consideration to all legitimate factors of difference between them, demonstrates that the Nashville rate is unreasonably higher than the Louisville rate.

*Fourth.* That a comparison of the revenue per car-mile on this coal traffic with the average revenue per car-mile on other classes of traffic on appellants' lines, and also on the Illinois Central and Tennessee Central roads, demonstrates that the average car-mile revenue on this traffic largely exceeds the average car-mile earnings on other classes of freight.

Taking up the propositions seriatim, it is argued as to each one that it is insufficient to support the finding that the rate was unreasonable, and therefore the order of the Commission should be enjoined. To this there are two obvious answers:

The first is that it is the cumulative effect of these facts, and not their isolated strength, upon which the order of the Commission must rest. All of them clearly point in one direction, to wit, the unreasonable character of this rate.

A similar line of argument was attempted by these same appellants in *Interstate Commerce*

*Commission v. Louisville & Nashville R. R. Co.*,  
227 U. S. 88, in which case this court said (p. 98):

It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. *For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended.* These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. *The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country.* So, too, the fact that a Commodity rate is low may cast

some light on the reasonableness of the higher rate on the Class, from which that commodity was taken or to which it might be legally restored.

In the second place, it not only does not appear that these so-called findings of fact exhausted the evidence before the Commission, but it affirmatively appears that there was a large mass of evidence before the Commission and considered by it which the petitioners did not see fit to present to the court, advancing "the great size and volume of said record as being justification for not filing same at this time." The court is now asked to presume that there is nothing in this voluminous record which will support the Commission's order. As the court below well says (R. 90):

It necessarily follows that where the party complaining of an order made by the Commission does not exhibit to the Court the evidence taken before the Commission, but in lieu thereof insists that the evidential facts found by the Commission are insufficient to support its conclusion as to the reasonableness or unreasonableness of a given rate, such conclusion of the Commission should be accepted by the Court as final and not reviewable upon the evidential weight of such facts, unless it appears, not only that the Commission undertook to embody in such findings all the material facts established by the evidence, but, in addition, either that the evidential facts so found furnish no substantial support to

such conclusion, or that such conclusion is contrary to the indisputable character of such evidential facts, in which cases the conclusions would involve an error of law reviewable by the Court.

### III.

The order of the Commission as to discriminatory switching practices likewise involves a question of fact, as to which the finding of the Commission is neither without substantial evidence to support it nor contrary to the indisputable character of the evidence. Nor does it violate any constitutional or statutory right of appellants.

Undue discrimination is a question of fact within the peculiar province of the Commission. *Int. Com. Comm. v. Alabama Midland Ry. Co.*, 168 U. S. 144, 170; *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196; *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247; *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314; *Pennsylvania Company v. United States*, No. 591, October Term, 1914, decided February 23, 1915.

As to that portion of this order with reference to switching practices, we submit the case last cited (*Pennsylvania Company v. United States*) as decisive of the case at bar. In that case the Pennsylvania Company refused to switch at Newcastle any cars arriving over the Buffalo, Rochester & Pittsburgh line, although it performed a like service for other railroads at fixed rates. In

the case at bar the discrimination is not directed to all cars over the lines of the Tennessee Central, nor to all classes of freight, but only to shipments of coal. Cars containing other freight are switched at a flat charge of \$3 per car; and even as to coal, one of the appellants, the Nashville, Chattanooga & St. Louis Railway, at one time had in force a switching rate of 60 cents per ton, which rate, however, was promptly cancelled when the testimony before the Commission in this case disclosed its existence.

It is clear, therefore, that the discrimination in this case differs from the discrimination in the Newcastle Switching Case only in degree, and not in kind, and the order of the Commission directing its discontinuance is fully within the Commission's powers.

#### CONCLUSION.

The decree of the court below should be affirmed.

JOHN W. DAVIS,  
*Solicitor General.*

FEBRUARY, 1915.



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IN THE  
Supreme Court of the United States

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OCTOBER TERM, 1914.

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Louisville & Nashville Railroad  
Company, et al.

VS.

United States of America, et al.

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No. 673.

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STATEMENT OF THE CASE.

Inasmuch as the origin, facts and history of the case have been fully stated in the briefs of the Government and of the Interstate Commerce Commission, it will be unnecessary for the intervenors, the Traffic Bureau of Nashville, the City of Nashville and Davidson County to make further reference thereto.

BRIEF AND ARGUMENT.

This Court has held that the Interstate Commerce Commission has jurisdiction over questions of fact to revise the rates, rules, regula-



tions and practices under Sections 1, 3 and 15 of the Act to Regulate Commerce, approved February 4, 1887, and Acts supplementary and amendatory thereof. *United States v. L. & N. R. R. Co.*, 235 U. S., 314, 320.

The Commission made its finding and issued its orders finding that the rates of one dollar per ton on coal on the L. & N Railroad, and on the N., C. & St. L. Railway were unreasonable and that a rate of eighty cents on the L. & N. Railroad and ninety cents on the N., C. & St. L. Railway were as reasonable rates, and that the switching practice was discriminatory and must be stopped.

There was no evidence brought forward by the appellants in this case from the trial before the Interstate Commerce Commission. Their contention is that the findings, as stated by the Commission were insufficient to deduce the conclusion that the old rates were unreasonable and the prescribed rates were reasonable.

The appellants do not contend that the Interstate Commerce Commission's report contains all of the facts. There is no statement in their finding or order upon which to predicate such an argument. The rule, as we understand, of this Court is that the orders of the Interstate Commerce Commission are surrounded with

every presumption that the finding and the order is legal and correct until it is specifically pointed out by the appellants from the record wherein it is illegal, oppressive, confiscatory and without facts to support it. The appellants declined to adduce any of the evidence introduced before the Interstate Commerce Commission and withdraw from the consideration of the Court all criticism of the primary facts with the statement that the evidence was too voluminous to bring forward. The appellants cannot be allowed to criticise the findings of the Interstate Commerce Commission without also bringing forward the entire record upon which the finding was based.

The Interstate Commerce Commission was created and given the power to pass upon facts and determine rates. It has been said that by reason of their familiarity with rates and the switching practices of railroads, that the Courts will presume, unless there are cogent facts of record to the contrary, that the orders of the Commission are reasonable and warranted.

As a case in point we cite the following:

The Supreme Court, speaking through Mr. Justice Lamar, said:

“The reasonableness of rates cannot be proved by categorical answers, like those

given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. . . .

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive."

*Interstate Commerce Commission v. U.*

*P. R. Co. et al.;*

*I. C. C. v. N. P. Ry. Co. et al.;*

*I. C. C. v. Great N. Ry. et al.*, 222 U. S.,  
549, 56 L. Ed.

The report of the Commission, which is a part of the record before this Honorable Court, shows that it considered before it made its findings the following evidence :

“Innumerable exhibits comparing on ton, car and train mile basis the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi Rivers from mines in Kentucky, Tennessee and Virginia; with rates on coal prescribed by this Commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per ton and per car-mile rate received by defendants and other carriers on all traffic. Rec., p. 62.”

The appellants state on page 5 of the transcript of record as their reason for not bringing forward all of the evidence which was before the Commission “the great size and volume of said record.”

The following records in other cases were introduced before the Commission as evidence in the instant case, to-wit :

*“Black Mountain Coal & Laid Company et al. v. Southern Railway Company et al., I. C. C. Docket, 1381, heard at Washington, D. C., April 22 and 23, 1908.*

*Andy’s Ridge Coal Co. et al. v. Southern Railway Company et al., I. C. C. Docket No. 2836, heard at Knoxville, Tenn., January 24, 25 and 26, 1910.*

*Alabama Coal Operators’ Association v. Southern Railway and Louisville & Nashville Railroad Company, I. C. C. Docket No. 3153, heard at Birmingham, Ala., December 16 and 17, 1910.*

Investigation and Suspension Docket No. 71.

In the matter of the investigation and suspension of advances in rates by carriers for the transportation of coal and coke in carloads from points on the Louisville & Nashville Railroad to points on the Cleveland, Cincinnati, Chicago & St. Louis Railway and other destinations. (26 I. C. C. Rep., 20-33.)

*Memphis Freight Bureau v. Louisville & Nashville Railroad Company et al., I. C. C. Docket No. 2998, 26 I. C. C. Rep., 402-406.*

And by like stipulation it was agreed that any record in the office of the Commission might be considered in this case.”

A further prolongation of this argument is unnecessary either by reference to the facts con-

tained in the record or the references in the record and the evidence which was not brought forward, or by further citation of authority.

The practice of refusing reciprocal switching relations between the several railroads entering the terminals for city service has been declared by Congress to be contrary to the public welfare and it has been reprobated by the Commission which has jurisdiction over the subject. This Court has had the question before it in many cases and phases. The vice inherent in the practices heretofore obtaining here at Nashville, was fully discussed and inquired into before this Court in the *New Castle* case. The same question was largely at the bottom of the case of the *United States v. Terminal Railroad Association*, 224 U. S., 383, and also the *St. Louis Terminal* case, recently decided before this Court. We are aware that the St. Louis cases came up under the anti-trust provisions, however the underlying question was the same.

The ultimate purpose of the provisions of Section 3 of the Act to Regulate Commerce applicable to the terminal situation, is that Congress intended to prevent a monopoly arising or being created which was made possible on account of the geography and topography of any municipal situation by which a railroad or railroads

could capture the strategic points of ingress and egress to a community and sit guarded over the gates of its commerce. This Act designs to make such an odious situation impossible whether it be exercised through the device of a terminal company or by the lines of one or more carriers and whether that be accomplished by the organization of a company whose ultimate purpose is to construct and then lease its entire properties to other companies for operation. The partnership arrangement between the two appellants cannot avail in the evasion of the statute. The Commission found the terminals open. The appellants were operating the terminals on a charge actual cost as between themselves and on a basis of a traffic of \$3.00 per car for all non-competitive freight except coal.

We think that we are justified in stating that under this statement that the Commission was within the jurisdiction of the statute and was thoroughly justified in issuing its order to restrain the further operation of the discriminatory switching practices at Nashville.

The complaint of appellants that the order of the Commission prohibiting the existing switching practice was confiscatory cannot be true because the order does not fix or attempt to name the rate at which coal shall be switched from the

Tennessee Central tracks. The only requirement is that all coal shall be switched without discrimination and the publication of the tariff is left to the operating road. (R., 73 and 74.)

### CONCLUSION.

In conclusion we think that the order of the Interstate Commerce Commission should be sustained.

Respectfully submitted,

A. G. EWING, JR.,

T. J. McMORROUGH,

*Counsel.*

Nashville, Tennessee.



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No. 678.

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**In the Supreme Court of the United States.**

OCTOBER TERM, 1914.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND  
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,  
APPELLANTS,

v.

THE UNITED STATES, INTERSTATE COMMERCE COM-  
MISSION, CITY OF NASHVILLE, ET AL., APPELLEES.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE MIDDLE DISTRICT OF TENNESSEE.

---

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE  
COMMISSION.

---

JOSEPH W. FOLK,

CHARLES W. NEEDHAM,

Counsel for Interstate Commerce Commission.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

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LOUISVILLE & NASHVILLE RAILROAD COM-  
pany and Nashville, Chattanooga & St.  
Louis Railway, appellants,

*v.*

THE UNITED STATES, INTERSTATE COM-  
merce Commission, City of Nashville,  
et al., appellees.

No. 673.

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE.*

---

**BRIEF ON BEHALF OF THE INTERSTATE COMMERCE  
COMMISSION.**

---

## STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Middle District of Tennessee, denying a motion of appellants for an interlocutory injunction against the enforcement of an order of the Interstate Commerce Commission.

The petition filed in the District Court by the appellants prayed for a preliminary and permanent injunction restraining the enforcement of two orders of the Interstate Commerce Commission entered December 9, 1913. In the proceedings before the commission, in which the orders were issued, the Traffic Bureau of Nashville, Tenn., was complainant and the appellants and other railroads were defendants. The report (28 I. C. C., 533) and order of the commission in that proceeding are found in the printed record beginning at page 60. The orders (Rec., pp. 72, 73, and 74) are contained in one issue, but have reference to two distinct controversies.

The first order relates to and makes a reduction in the rates on coal of the Louisville & Nashville Railroad from mines on its Owensboro and Henderson divisions in western Kentucky to Nashville, Tenn.; and rates on coal on the Nashville, Chattanooga & St. Louis Railway from mines on its road in Alabama, and in Tennessee the movement of which is through Alabama, to Nashville. The rate on the Louisville & Nashville Railroad was reduced from \$1 to 80 cents per ton, and the rate on the Nashville, Chattanooga & St. Louis Railway was reduced from \$1 to 90 cents per ton. This order is made under sections 1 and 15 of the act to regulate commerce.

The second order is in reference to interswitching of coal at Nashville. It requires the appellants to cease and desist, and for a period of



not less than two years to abstain " from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks." This order applies in express terms to " each and every defendant " and requires that " interswitching of interstate carload shipments of coal at Nashville " shall be performed by all defendants without discrimination for each other. This order is under section 3 of the act. The Illinois Central and Tennessee Central have not objected to the order.

In each of these orders the appellants are required to file and publish schedules showing the rates prescribed by the commission, and to adopt, with the other defendants, a switching practice that shall conform to the requirement of the second order.

The report of the commission is expressly made a part of each order and contains the conclusions of the commission: (1) That existing rates on coal were unreasonable, fixing in each case reasonable maxima; and (2) that the switching practice at Nashville was " unreasonable and unjustly discriminatory " in that the appellants unjustly discriminated against shipments of coal from the Tennessee Central and unduly preferred shipments of coal from the lines each of the other.

The appellants filed the following exhibits with their petition: "A," a copy of the complaint filed by the Traffic Bureau of Nashville with the Interstate Commerce Commission; "B," the answer filed by the Louisville & Nashville Railroad Company to said complaint; and "C," the answer of the Nashville, Chattanooga & St. Louis Railway Company to said complaint. Exhibit "A" sets forth certain tariffs on coal and mileages by way of showing that the rates complained of are unreasonable, which comparable rates are not denied by the answers filed by the appellants. There was also filed with the petition as an exhibit "E" the report and orders of the commission. Exhibit "E" seems to have been omitted from the record filed in this court, but will be found as exhibit "A" to the answer of the Interstate Commerce Commission.

The appellants sum up their charges against the orders in paragraph (8) of their petition (Rec., p. 9) as follows:

(8) Your petitioners further say that the Interstate Commerce Commission, in making said report and orders, acted in a capricious and unreasonable manner, exceeding the authority delegated to it by Congress, and erred as a matter of law in the following particulars:

(a) The findings and orders made by the commission were wholly without substantial evidence to support them.

(b) The findings and orders made by the commission were contrary to the indisputable character of the evidence.

(c) The facts found by the commission do not as a matter of law support the orders made by it.

(d) The commission was without jurisdiction to make the orders.

(e) The enforcement of the orders made by the commission will result in the taking of petitioners' property without due process of law and will result in the taking of petitioners' property without just compensation, in violation of the fifth amendment of the Constitution of the United States.

Three of these objections are expressly predicated upon, and can only be determined by an inspection of, the record of the evidence before the commission. In reference to this record, the petition says (Rec., p. 5):

And petitioners offer to produce and file as a part hereof, marked "Exhibit D," a transcript of the record of said hearings when and if required so to do, the great size and volume of said record being justification for not filing the same at this time. Petitioners say that said transcript embraces all the evidence which was introduced before the Interstate Commerce Commission in said proceedings and hearings.

This transcript was not produced before the judges upon the motion for the interlocutory injunction and consequently is not included in the

record before this court. Material portions of the evidence before the commission, however, will be considered in connection with the argument herein.

The appellants filed with their motion the affidavit of George W. Lamb, second assistant comptroller of the Louisville & Nashville Railroad Company, with a printed statement attached thereto, which affidavit and statement are found on pages 78 to 81 of the record. Appellants also filed an affidavit by C. B. Compton, freight traffic manager of the Louisville & Nashville Railroad Company, which appears upon pages 81 and 82 of the record.

The Interstate Commerce Commission filed its sworn answer, with a copy of its report and orders aforesaid, which were considered by the judges in the hearing of the motion for an injunction.

The foregoing constitutes the record upon which Judges Warrington, McCall, and Sanford, sitting as the District Court, were asked to issue an interlocutory injunction.

The order of the commission was entered on December 9, 1913, to become effective February 15, 1914, upon five days' notice. This necessitated the filing of the tariffs on or before February 10, 1914. The petition of the appellants for an injunction was not filed until the 5th day of February, 1914 (Rec., p. 2), and prayed for "a preliminary injunction" and a final decree restraining and annulling the orders. The statute provides that a five days' notice shall be given to the United States and the

Interstate Commerce Commission of any application for an interlocutory injunction.

The court was convened to meet on the earliest day compatible with the requirements of the statute, namely, February 10, 1914. It will be observed, therefore, that the motion for the injunction was made at Nashville, Tenn., on the last day on which the appellants could file their tariffs in Washington and comply with the orders.

Upon the convening of the court at 10 o'clock a. m., the appellants asked for a 60-day restraining order under the provisions of the statute, without amending the prayer of their petition. This motion for a restraining order was heard and determined by the judges, upon the request of the appellants' counsel, in time to allow the counsel to telegraph to their agent in Washington to file the tariffs already prepared to comply with the orders if the restraining order were not granted. Arguments were heard and after the recess the judges denied the motion for a restraining order. (Rec., p. 100.) Upon request of counsel for appellants, the arguments were then made before the judges upon the prayer in the petition for a preliminary injunction, and the matter was taken under advisement. In the meantime the tariffs were filed. On September 1, 1914, the judges denied the motion for an interlocutory injunction by an order which was duly entered on September 8. (Rec., p. 101.) In connection with the order, the judges also filed a unanimous opinion, which appears on pages 83 to 97 of the record.

From this interlocutory order the appellants have appealed to this court.

#### QUESTIONS INVOLVED.

There are twenty-two assignments of error, presenting in their final analysis the following issues:

I. Did the Commission have jurisdiction over the subject matter in controversy?

II. Was there substantial evidence to support the orders?

III. Upon its findings of fact did the Commission have power to order the appellants, and other defendants before it, to cease and desist from unjust discrimination in the practice of switching at Nashville?

IV. Do the orders take petitioner's property without due compensation, in violation of any of the provisions of the fifth amendment to the Constitution of the United States?

V. Was the refusal of the District Court to grant appellants' motion for an interlocutory injunction arbitrary or based upon an error of law?

#### ARGUMENT.

I. All the matters in controversy were cognizable by the Commission.

A. *Powers of the commission.*—Section 15 of the act to regulate commerce provides:

That whenever \* \* \* the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common car-

rier or carriers subject to the provisions of this act \* \* \* or that any \* \* \* practices whatsoever of such carrier or carriers \* \* \* are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what \* \* \* practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation \* \* \* in excess of the maximum rate or charge so prescribed, and shall adopt \* \* \* and observe the regulation or practice so prescribed.

*B. Character of Orders.*—The report of the commission is divided into two separate and distinct parts. The first part deals with rates for the transportation of coal from mines on the Owensboro and Henderson divisions of the Louisville & Nashville Railroad Co. and the transportation of coal by the Nashville, Chattanooga & St. Louis Railway from mines on its road in Alabama and Tennessee, the movement of which is through

**Alabama.** The second portion of the report deals with the practice in respect to interswitching of interstate carload shipments of coal at Nashville, Tenn. There are two orders in one issue.

*C. Orders issued after full hearing.*—The petition does not claim that the petitioners were not accorded a full hearing by the commission; nor does it assert that there was any failure on the part of the commission to observe the procedure prescribed by the statute.

*D. Subject matters of Orders within Commission's jurisdiction.*—While the petition states in a general phrase that the Commission was without jurisdiction, it points out no facts to support this statement. Section 15, above quoted, settles the question beyond any controversy that rates and practices of carriers subject to the act are expressly within the jurisdiction of the Commission, and power to determine their reasonableness and to prescribe reasonable rates and practices for the future is expressly conferred upon the commission by the act. The authorities cited also declare that the Commission has these powers.

**II. There was substantial evidence before the Commission to support the orders in question.**

*A. Sufficiency of evidence, generally.*—In *Int. Com. Comn. v. Union Pacific R. Co.*, 222 U. S., 541, this court said:

The reasonableness of rates cannot be proved by categorical answers, like those



given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics, and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. \* \* \*

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same, for there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in the mass of facts that out of which experts could have named a rate. The law makes the commission's finding on such facts conclusive (pp. 549, 550).

*In Int. Com. Comm. v. Louisville & Nashville R. Co.*, 227 U. S., 88, in answering the question whether there was substantial evidence to support the order,

this court reviews the history of the rate, the movement of the traffic, and said:

Its tariffs and those of other railroads were offered as a basis for comparing the rates under attack with those charged by this and other companies for similar and longer distances (p. 96).

B. *Sufficiency of evidence as to reasonableness of rates involved.*—The first division of the report and order deals with the question of the rates upon coal into Nashville from the western Kentucky and eastern Tennessee and Alabama mines. The average distance being about 108.5 miles from the former and 140 miles from the latter mines. The rate was \$1 per ton. This rate the Commission found to be unreasonable and prescribed 80 cents as a reasonable rate over the Louisville & Nashville from the western Kentucky mines, and 90 cents over the Nashville, Chattanooga & St. Louis Railway from the Tennessee and Alabama mines, where the movement is through Alabama. In arriving at the decision that the rate was unreasonable and that the rates prescribed were reasonable the Commission's report shows that it considered the following evidence:

Innumerable exhibits comparing on ton, car, and train mile basis the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Missis-

issippi Rivers from mines in Kentucky, Tennessee, and Virginia; with rates on coal prescribed by this commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per ton and per car-mile rate received by defendants and other carriers on all traffic. Rec., p. 62.)

The petition states that the record is voluminous and filled with statistics. These facts and statistics are of the same kind considered by this court in the *Union Pacific* and *Louisville & Nashville* cases, *supra*, and were declared to constitute substantial evidence "upon which an expert body may arrive at conclusions" regarding the unreasonableness of a rate and what would be a reasonable rate. It is sufficient for this inquiry that this evidence was before the commission and was discussed by counsel for the petitioners in a full hearing. The report conclusively shows that the commission considered such evidence; discussed it and concluded that the rates charged by appellants were unreasonable and that the rates fixed in the order were reasonable for the services rendered. These statements in the report show that the order was supported by substantial evidence; and the report is the only evidence of this fact in the record.

C. *Orders based upon probative evidence.*—The orders in question were based upon consideration by the commission of the various elements of reasonableness with respect to rates, including ton-mile statistics, per-car earnings and distances involved, train-mile earnings, empty-car hauls, and competition of near-by mines, and upon the recognition by the commission that statistics must be nearly analogous. The report of the commission shows conclusively not only that these facts were before it of record, but that they were accorded due consideration.

The history of the rate in controversy is set forth. This shows what the companies had voluntarily done to meet the situation, both as an inducement to move the traffic and to meet competition at different points. No carrier continues to carry freight at less than a profit for a very long time. Short, sharp, and destructive competition is of brief duration. The rates established and maintained for a period of years by a carrier constitute substantial evidence, which aids in drawing conclusions as to the reasonableness of a rate. (*Louisville & Nashville Ry. v. Finn*—decided January, 1915.)

Again, the rate from the Kentucky field to Memphis over the Louisville & Nashville is a very important fact. It had recently been investigated and found to be reasonable. It bears upon the question of the cost of transporting coal over this

line and, when properly considered by experts, is persuasive evidence. The Memphis rate had been the subject of sharp controversy before the commission in a former case. The record in that case was made a part of the record in this case. The judges were furnished with a copy of that report, dated December 3, 1912. (*Memphis Freight Bureau v. L. & N. R. R. Co. et al.*, 1. C. C., 402.) The fact that there is competition at Memphis, both water and rail, does not make it any less a fact to be considered in its proper bearing. The competition was considered in connection with the rate. The facts show, in both cases, beyond controversy, that the water competition only brought the rate down to \$1.40 per ton. The competition with the Illinois Central from the same fields, but with a longer haul, did not affect the rate for several years. When the "Fisco," with a shorter haul from its Alabama mines, brought coal into Memphis a rate war was precipitated which bore the rate down to 45 cents and, in October, 1901, a rate of \$1.25 from all mines was agreed upon and established. This rate was reduced in August, 1902, to \$1, and so remained until it was advanced to \$1.10 in 1911.

Thus we see that for nearly 10 years this traffic was carried to Memphis from the Kentucky field for \$1 per ton, while the same rate was charged from the same field to Nashville, the average distance to Memphis being 276 miles and that to

Nashville 108.5 miles. When the rate to Memphis was raised to \$1.10, shippers complained that the rate was unreasonable, and the hearing before the commission, referred to, was had. (26 I. C. C., 402.) The case was submitted in October, 1912. The increased cost to the railroad in wages and other items was considered, and the commission found that the rate of \$1.10 was a reasonable rate for the average haul of 276 miles. This Memphis rate produces a per-ton-mile revenue of slightly less than 4 mills. The rate charged to Nashville produced a revenue of 9.2 mills per ton-mile. The commission reduced the rate on the Louisville & Nashville one-fifth, which would leave the rate about 7.36 mills. This is almost double the per-ton mile of the Memphis rate. This constitutes substantial evidence and was properly considered by the commission.

The rate from the Kentucky field to Louisville was considered. The distance to Louisville varies, but is, on the average, longer than the hauls to Nashville. The rate to Louisville was 60 cents, but in June, 1913, it was advanced to 65 cents. Comparisons were made and competition considered. It was an item of evidence substantial and persuasive. But the rate finally fixed by the commission is 33 $\frac{1}{3}$  per cent higher than the Louisville rate, disregarding the increased distance.

In view of what this court has defined "substantial evidence" to be, there was substantial evi-

dence in this case to support the order relating to the rates and no rule of evidence was violated.

The distance over the Nashville, Chattanooga & St. Louis is longer than the haul over the Louisville & Nashville, and the rate on that line was not reduced as much as over the last-named line.

D. *Orders not arbitrary.*—The existence of substantial evidence above shown also disposes of the charge that the action of the commission was “arbitrary.” The meaning of this word, used in this connection, may be drawn from the opinion in the *Union Pacific case, supra*, and other cases in which that case has been cited by this court. The cases clearly show that arbitrary action is where the court acted *without evidence* or clearly contrary to the *uncontradicted evidence*. The court expressly disclaims any right to weigh the evidence, and therefore it can not be said to be arbitrary because against the weight of evidence. Nor can it be because the order is, in the judgment of the court, unwise. In the *Union Pacific case, supra*, it was stated that the court “will not consider the expediency or wisdom of the order or whether, on like testimony, it would have made a similar ruling.” If, then, there was substantial evidence to support the order, the action of the Commission can not be condemned as *arbitrary*, or an unreasonable exercise of power.

III. On the facts of record before it, the Commission was empowered to require appellants to cease and desist from their unjust discrimination with respect to switching practices at Nashville.

A. *Switching practices at Nashville.*—As shown by the report of the commission, beginning page 69 of the record, the terminal tracks of the appellants at Nashville are divided into three parts: (1) That part vested in the Louisville & Nashville Terminal Company, a corporation whose entire capital stock is owned by the Louisville & Nashville; (2) that vested in and operated by the Louisville & Nashville; and (3) the part vested in and operated by the Nashville, Chattanooga & St. Louis.

1. Without going through the processes of incorporation and manner of acquiring title, it is sufficient to say that the terminal company holds the title to 1.07 miles of main line and 30.32 miles of sidings.

In 1896 all of its property was leased for 999 years jointly to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount to be paid by each company being determined on basis of use. The operating expenses are prorated upon the same basis. (Comm. Report, Rec., p. 69.)

2. The Louisville & Nashville Railroad Company owns tracks within the switching district, which it operates independently.



3. The Nashville, Chattanooga & St. Louis Railway also owns and operates independently tracks within the switching district.

The appellants, as operating companies, inter-switch traffic of all kinds for each other to and from all these terminals within the switching district of Nashville between fixed points at rates named in their tariffs.

The Tennessee Central Railroad has physical connection with the railroads of appellants within the switching district of Nashville. Interswitching of non-competitive traffic was carried on at tariff rates between the Tennessee Central and the appellants *except as to coal*. The facts stated by the Commission and its conclusions are as follows (Rec., p. 70):

Prior to 1907 neither of these roads [appellants] would switch freight of any kind to or from the Tennessee Central, but in that year, "in deference to public opinion," they began switching all noncompetitive traffic, *except coal*, to and from the Tennessee Central. The charge for this service is \$3 per car. Although both roads are emphatic in asserting that they have never considered the switching of coal from the Tennessee Central, the Nashville, Chattanooga & St. Louis did have effective rates applicable to and from its interchange with the Tennessee Central under which such a movement could have been accomplished for 60 cents per ton. Some

surprise was expressed when this fact was developed at the hearing, and shortly thereafter this rate was canceled. Complainants aver that this situation unjustly discriminates against coal from the Tennessee Central, that the practice with respect to switching coal at Nashville is unreasonable, and that the charge therefor (effective until shortly after the hearing) is unreasonable. While the switching tariff of the Tennessee Central is similar to those of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that road's refusal to switch coal from either of the other lines is in reality a retaliatory measure. It has styled itself a "cross-complainant" and favors this portion of petitioners' prayer. (Rec., p. 70.)

\* \* \* \* \*

Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other. (Rec., p. 71.)

*B. Appellant's theory as to error assigned.*—Appellants claim that this order is in excess of the authority conferred upon the Commission. They base their claim upon the exception in section 3 of the act to regulate commerce, which reads:

\* \* \* But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

This provision must be read in connection with the substantive law which precedes it. This is as follows:

Every common carrier \* \* \* shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. (Sec. 3, act to regulate commerce.)

Section 15 of the act provides:

That whenever, after full hearing upon a complaint \* \* \* the commission shall be of opinion \* \* \* that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly

discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe \* \* \* what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order \* \* \* \*

The complaint before the commission was filed by the traffic bureau of Nashville, Tenn., and complained of the regulation and practice regarding the exclusion of coal from the interswitching practice by the appellants. The appellants admitted the practice, but defended it solely upon the ground:

That to require them to perform this switching would be to compel them to give the use of their terminal facilities to another carrier engaged in like business, in contravention of the proviso of section 3, that their terminals are not now open to any except noncompetitive traffic; and that, while coal comes from noncompetitive points, the very nature of the commodity renders it competitive. (Rec., p. 70.)

In reply to this contention by appellants, the commission, in its report, said (p. 70):

As we said in *Merchants & Mfrs. Asso. of Baltimore v. P. R. R. Co.*, 23 I. C. C., 474, 476, "Terminals are either open or they are not," and a carrier may not exer-

cise an arbitrary discretion, based upon a strained construction of the proviso of section 3, in saying for what roads and what traffic it will open its terminals and for what other roads and traffic it will decline so to do. In this case the joint and the separately owned terminals of each of these two defendants are open to all of the traffic of the other; are open to all noncompetitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate.

The report shows that there are industries located on all the lines of railroads within the switching district to which coal is consigned from different mines. To enable these industries to secure coal from mines served by the different railroads it is necessary that there be an interswitching service between all the roads.

All of the railroads entering Nashville have voluntarily opened their terminals and published tariffs for the switching of cars from and to industries located upon their lines within the switching district. Coal is excepted from this privilege. The theory of the appellants is that coal is competitive traffic, and, being competitive, they may discriminate against it. Admitting that coal is competitive, the question arises whether under the law the appellants may discriminate against traffic simply because it is com-

petitive. Or, to put it in another form, is the power given to the commission in section 15 to determine whether classification and practices are in violation of the act, restricted by a carrier's right to exclude "competitive traffic" from certain transportation services offered?

The appellants are not dealers in coal. They are simply furnishing transportation for coal. Their competition is for the traffic; if, by reason of disadvantageous circumstances in the matter of delivery, an industry is compelled to buy its coal from the mines on appellants' lines, to the exclusion of coal upon the lines of other carriers, they say they may create such disadvantages by arbitrary classification in interswitching because the *transportation* is competitive.

If the appellants may refuse interchange privileges to a commodity, why may they not exclude particular mines and say that they will not switch cars from mines in a particular locality or from certain shippers and thus compel the industries on their sidings in Nashville to buy all their coal from other mines or other shippers? If they may thus discriminate in the practice of interswitching carried by their tariffs, why not as to line hauls?

Whenever one engages in that business [common carrier] the obligation of equal service to all arises, \* \* \*. *Mo. Pac. Ry. v. Larabee Mills*, 211 U. S., 612, 619.

Section 3, in the first paragraph, forbids discrimination between shippers or localities. To re-

fuse this privilege to the Tennessee Central and its connecting line, the Illinois Central, is to put all mines upon these lines at a disadvantage in Nashville, and to give a preference to the mines which are located upon, and ship over, the appellants' roads that enjoy this privilege. Coal is mined by the owners, who are the shippers, and this discrimination runs against them. If the Commission finds, upon the undisputed facts, that this is an *unjust discrimination*, an *unlawful preference*, will the courts say that it is not?

This court, speaking through the Chief Justice, said:

In view of the doctrine announced in *Interstate Com. Com. v. Illinois Cent. R. R.*, 215 U. S., 452; *Interstate Com. Com. v. Delaware, L. & W. R. Co.*, 220 U. S., 235; *Interstate Com. Com. v. Louisville & Nashville R. R.*, 227 U. S., 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the general purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or

discrimination existed.—*United States v. Louis. & Nash. R. R. Co.*, 235 U. S., 314, 320.

The question of opening the terminals is not, we submit, involved in this case, as the railroads have voluntarily opened their terminals and by their tariffs and practice are complying with the positive requirements of section 3 which make it the duty of carriers "according to their respective powers" to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith." The sole question is whether, in rendering this service, they may *discriminate against a particular commodity*. It will be observed that this paragraph in section 3 does not use the word *undue* discrimination, but says that the carriers "shall not discriminate in their rates and charges between such connecting lines." A prohibitive rate of 60 cents had been put in by one of the appellants for switching coal from the Tennessee Central while a charge of \$3 per car was the tariff rate to the other roads. This was a clear violation of the provision in section 3.

The finding of the commission was that the practice of the appellants "with respect to switching coal at Nashville is unreasonably and unjustly discriminatory."



IV. The order with respect to switching practices does not deprive appellants of their property without due compensation, in violation of the Fifth Amendment to the Constitution of the United States.

A. *Requirements of the order.*—The pertinent provisions of the order in question are as follows:

That the defendants \* \* \* be, and they are hereby, notified and required \* \* \* to abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tennessee, than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.

\* \* \* [and] to maintain and apply to the interswitching of interstate carload shipments of coal at Nashville, Tennessee, a practice which will permit the interswitching of such shipments from and to the lines of each and every defendant [including the Tennessee Central Railroad Company]. (Matter in brackets added.)

B. *Construction of exception in section 3.*—This exception follows the substantive law of the section which provides, as noted, *supra*, that each railroad shall according to its ability furnish to connecting carriers “equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering” of freight. We submit that the proviso should not be so construed as to annul the substantive law.

It should receive a construction that will give full effect to the act and at the same time protect the railroads from unfair invasion or interference with their terminal tracks. The interests of the public are to be considered, and the carrier is required to furnish *transportation* of this character on equal terms.

The act to regulate commerce deals with transportation. It does not undertake to control the conjoint *use* by carriers of their tracks or terminals with other lines. A railroad company may allow to another railroad trackage rights over any part of its line, or the joint use of its terminals, and refuse a like privilege to another railroad; this is not unlawful discrimination. But a company may not refuse *transportation* over its tracks to one carrier or shipper while giving such *transportation* to another carrier or shipper. The discrimination forbidden by the act has reference to *transportation*.

Transportation is *movement*, and when one carrier *moves* over *its tracks* the cars of another carrier *it is furnishing transportation* to the latter. To refuse to one road or shipper a *transportation service* which it is offering by its tariffs and practice to others carriers or shippers is in direct violation of the act. Transportation as used and defined in the act includes "all instrumentalities and facilities of shipment or carriage \* \* \* and all services in connection with the receipt, delivery,

elevation, and transfer in transit," which a carrier is performing for any shipper or carrier. There is a clear and well defined distinction between the use of tracks and facilities which one carrier by contract voluntarily accords to another carrier, and the transportation services which a carrier performs for the public. The commission may regulate the latter; the former is beyond its jurisdiction.

To compel a carrier to give the use of its property or any part of it to another carrier would be a taking of property without compensation. But a common carrier may be required to furnish transportation upon equal terms to all comers. Of course, there must be compensation for the service rendered, but the law may say as to a transportation service by a common carrier that there shall be no discrimination between those desiring the service, either as to the facilities afforded or the rates and charges made therefor.

A carrier has the use of the track made therefor. carrier when it may operate its own tracks of another carrier when it may operate its own cars and engines over such carrier's tracks by paying a rental.

"Use the tracks" implies paying a rental. purpose of operating its cars there use for the *Colonial City Trackage Co. v. Ks* thereon. (*Co-R. R. Co. et al.*, 153 N. Y., 54 *Kingston City* 810.) 540; 47 N. E.,

With reference to the interchange of

It can not be said that the error had a constitutional right the plaintiff in right to burden

trade by insisting that the commodities should be unloaded and reloaded in its own equipment. Upon this point the case of *Wisconsin, etc., R. R. Co. v. Jacobson*, 179 U. S., 287, is decisive. There is no essential difference, so far as the power of the State is concerned, between such an order as we have here and one compelling the carrier to make track connections, and to receive cars from connecting roads, in order that reasonably adequate facilities for traffic may be provided.—*Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa*, 233 U. S., 334, 344. See also *Grand Trunk Ry. v. Michigan Ry. Commission*, 231 U. S., 457.

The usual significance of the word “use” means physical occupation of tracks. (*Rock Island Ry. Co. v. Rio Grande R. R. Co.*, 143 U. S., 590; *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S., 563, 582, 583.)

We are not discussing in this case whether the Interstate Commerce Commission has power to require a railroad to open its terminals and perform interswitching transportation, but we submit that when a railroad company has opened its terminals and is performing interswitching transportation for other carriers it may not discriminate between carriers, or as to the commodities which it will transport; and that requiring a carrier offering such transportation to perform it *without discrimination* is not requiring the carrier “to give the use of its tracks or terminal facilities to another carrier engaged in like business.”

V. There was no error in the refusal of the District Court to grant appellants' motion for an interlocutory injunction.

A. *Justiciable issues before District Court.*—The first concise statement of justiciable issues, in cases to restrain and set aside orders of the Commission made by this court, is in the *Union Pacific case*, in which Mr. Justice Lamar, delivering the opinion, said:

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided it has been settled that the orders of the Commission are final unless, (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (*Int. Com. Com. v. Ill.*

*Cent.*, 215 U. S., 452, 470; *Southern Pacific*  
*v. Int. Com. Com.*, 219 U. S., 433; *Int. Com.*  
*Com. v. Northern Pacific*, 216 U. S., 538,  
544; *Int. Com. Com. v. Ala*  
*Ry. Co.*, 168 U. S., 144, 174.

In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on the whole, the testimony, the order, or whether, on the whole, the testimony, it would have made a similar order made by law findings of the commission are true, and this is *prima facie* true, and this is the judgment prescribed to them the strength of the lawments of a tribunal appointed (Ill. *Cent.* and informed by experience. Its conclusion, *v. I. C. C.*, 206 U. S., 441.) Now, but when of course, is subject to be reversed as final; supported by evidence is accepted, as it does, not that its decision, involving interests, can so many and such vast public interests of proof—be supported by a mere scintilla of proof—but the courts will not examine whether there further than to determine whether to sustain the was substantial evidence to sustain the *Union Pacific* order. (*Int. Com. Comm. v.*)

*R. R.*, 222 U. S., 541, 547-548. the *Proctor*

These issues were again stated in *Proctor & Gamble* case, where the Chief Justice, speaking for the court, said:

The courts were confined by statutory operation to determining whether there had

been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred. (*Proctor & Gamble v. U. S.*, 225 U. S., 282.)

Again speaking through Mr. Justice Lamar, this court said:

The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." (36 Stat., 539, 15.) Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair; or whether, for any reason, the order is contrary to law, are all matters within the scope of judicial power. (*Int. Com. Comm. v. Louisville & Nashville R. R.*, 227 U. S., 88, 92-93.)

In the *Minnesota Rate cases*, speaking through Mr. Justice Hughes, this language was used:

And the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of

the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it. (*The Minnesota Rate cases*, 230 U. S., 352, 419-420.)

Speaking through Mr. Justice Lamar, the court again said:

All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the commission unless it is made plainly to appear that those ordered are void. (*I. C. C. v. Union Pacific R. R.*, 222 U. S., 541, 547.) No such showing is made in this case. The decree must, therefore, be affirmed. (*Atch. Railway Co. v. United States*, 232 U. S., 199, 221.)



B. *Reviewable issues on appeal from interlocutory order denying motion for injunction pendente lite.*—What are the issues to be reviewed upon an appeal from an interlocutory order denying a motion for an injunction *pendente lite*? This is an important question of practice, as there are many suits brought against the commission where injunctions are denied.

The act creating the Commerce Court in express terms allowed an appeal from an interlocutory order “*granting or continuing*” an injunction. The provision is found in section 210, Judicial Code, and reads:

An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission.

The statute did not authorize an appeal from an interlocutory order denying an injunction.

The act abolishing the Commerce Court, approved October 22, 1913, among other things, provides:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued \* \* \* unless the application for the same shall be presented to a circuit or

district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.

\* \* \* \* \*

An appeal may be taken direct to the Supreme Court of the United States from the order granting *or denying* after notice and hearing, an interlocutory injunction, \* \* \*.

In the *Lighterage case*, 225 U. S., 306, 324, 325, this court had before it an appeal from an order of the Commerce Court granting an interlocutory injunction. After deciding that a restraining order for 60 days must contain a statement of the facts showing irreparable damage resulting from the order of the commission, this court, considering the power to issue a preliminary injunction, speaking through the Chief Justice, said:

It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the commission instead of compelling that body virtually *eo instante* upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given *as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary and unreasonable exercise of the power conferred.*

\* \* \* \* \*

Our duty is \* \* \* to uphold the lawful authority of the court, without deviation and yet without hesitancy *where there has been an abuse of discretion* to correct it in the completest way. (Italics ours.)

This case seems to settle two questions: (1) That the granting of an interlocutory injunction is a matter of discretion resting with the judges, and (2) that on an appeal from an interlocutory order granting an injunction the question to be determined by this court is whether or not the judges are chargeable with an "abuse of discretion by an unwarranted, arbitrary, and unreasonable exercise of the power conferred." This ruling is applicable, we submit, and should be applied in cases of appeal, under the recent statute, from an interlocutory order denying a temporary injunction. In fact, it is difficult to see what other issue can be before the court.

The Circuit Court of Appeals, Fifth Circuit, in an appeal from an interlocutory order granting a temporary injunction, speaking through McCormick, Circuit Judge, said:

The volume of assisting and counter affidavits was large, and the conflict of this testimony sharp and emphatic, such as must, in the nature of the case, make variant impressions on the minds of different judges as to the facts shown. \* \* \* The providing by law for an appeal from an interlocutory order granting an injunction certainly clothes the court of appeals with the power and charges it with the duty

of reviewing, and in a proper case reversing, the action of the trial court in granting such injunctions; but as to issues of fact, presented as they only can be presented in such cases, the findings of the facts expressed or implied in the action of the trial court should be given due weight, and its action, so far as it rests on, or is affected by, the state of facts proved, should not be reversed unless it is made clearly to appear that it was improvident and hurtful to the appellant. — *Workingmen's Amalgamated Council v. United States*, 57 Fed., 85, 86.

The Circuit Court of Appeals of the Ninth Circuit, in a similar appeal, speaking through De Haven, district judge, said:

Inasmuch as the granting of an injunction *pendente lite* is committed to the discretion of the trial court, it necessarily follows—and so the authorities uniformly hold—that upon an appeal from such an order the only question which the appellate court is called upon to determine is whether the court, in making such an order, abused its discretion.—*Southern Pacific Co. v. Earl*, 82 Fed., 690, 692.

The Circuit Court of Appeals of the Eighth Circuit, in an appeal from an order *denying* a temporary restraining order, said:

In disposing of the application for a temporary restraining order the lower court was called upon to exercise one of its discretionary powers, and the order from

which the appeal is taken should not be disturbed unless there is a strong probability that on the final hearing the complainants will show themselves to be entitled to the relief sought by the supplemental bill, or unless it appears that the complainants will sustain great loss and damage, or that they will be put to unnecessary trouble and expense, *if the existing status is not maintained until the final hearing*. It rests in the sound judicial discretion of a chancellor to grant or withhold the species of interlocutory relief which was sought in the present instance, and, as the court has heretofore held, in substance, it will not undertake to reverse the action of a court or judge to whom an application for such relief is first addressed, unless it clearly appears that the court or judge erred in the exercise of that discretion, and that, in accordance with well-established equitable principles and rules of procedure, it should have acted differently. *City of Newton v. Levis*, 49 U. S. App., 266, 25 C. C. A. 561, 79 Fed. 715; *Kelley v. Boettcher* (C. C.) 89 Fed. 125, 128, 129.—*Higginson v. C. B. & Q. R. Co.*, 102 Fed., 197, 199.

The Circuit Court of Appeals, Fifth Circuit, in an appeal from an order *granting* a temporary injunction, speaking through Shelby, Circuit Judge, said:

Formerly the granting of an injunction *pendente lite* was in the absolute discretion of the primary court, inasmuch as its action

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was not reviewable by appeal. [Citing cases.] \* \* \* But since this act was passed its uniform construction has been that the granting of an injunction pending the suit is in the sound judicial discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity that have been established for the guidance of its discretion. In some of the cases the same meaning is expressed by saying that the ruling of the trial court in granting the temporary injunction will not be reversed unless there has been an "abuse" of its discretion, and in others it is said that the decree will not be reversed unless it clearly appears that the injunction has been "improvidently" allowed. The appellate court is not to decide what it would have done as to allowing the injunction, but it must recognize that the law has imposed on the trial court the responsibility of the exercise of this power and the duty to exercise this discretion, and unless there has been a plain disregard of some settled rule of equity which should govern the issue of injunctions, so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed.—*Kerr v. City of New Orleans*, 126 Fed., 920, 924.

The Court of Appeals of the State of New York, in an appeal from an interlocutory order *granting* a temporary injunction, speaking through Mr. Chief Justice Anderson, said:

Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction. \* \* \* It is doubtless sufficient that a probable or *prima facie* case be made, to justify the granting of an injunction *pendente lite*, but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error of law, which may be reviewed by this court on appeal.—*McHenry v. Jewett*, 90 N. Y., 58, 62.

The same court, again on a like appeal, speaking through Mr. Chief Justice Ruger, said:

The order was granted upon pleadings and affidavits presenting a controverted state of facts, and, so far as the question depends on such facts, we must assume that the court below proceeded upon the theory that the plaintiffs' version was correct. Upon this assumption it is quite clear that the order was discretionary and not appealable by this court. We have repeatedly held that the granting, continuing, or dissolving of a temporary injunction is within the discretion of the court of original jurisdiction, and that its determination can not be reviewed here.—*Strasser et al. v. Moonelis*, 108 N. Y., 611, 612.

The same court, speaking through Mr. Justice Finch, said:

We do not review the discretion which grants an injunction temporarily restraining a defendant until final judgment unless we are entirely satisfied that the plaintiff is not entitled to ultimate relief.

*MacLaury v. Hart et al.*, 121 N. Y., 636, 642; *Young v. R. K. G. L. Co. et al.*, 129 N. Y., 57, 60; *Castoriano v. Dupe*, 145 N. Y., 250.

In a case where an injunction was *denied*, the same court, speaking through Mr. Justice Vann, said:

In the case now before us the order of the General Term is silent as to the ground on which the injunction was denied. It therefore may have been made by the court, in the exercise of its discretion, to refuse an injunction until the trial of the action upon the merits, when the facts will be finally determined upon all the evidence after an opportunity for cross-examination of the witnesses.

We think the rule established by the decisions is that an order of the General Term affirming or refusing an order granting or denying a temporary injunction can not be reviewed by this court unless it appears from the record that the element of discretion was excluded or that the injunction was sustained when in fact there was no power to grant it or was set aside ex-



pressly upon that ground. Such an order of the court below presents a question of law that we have the right to review, but unless it clearly appears that the action of the court was not based upon its discretionary power we can not review it.—*Schneider v. City of Rochester*, 155 N. Y., 619, 623.

The Supreme Court of Georgia, speaking through Mr. Justice McCay, said:

The granting or refusing injunctions is in the wise discretion of the chancellor.  
\* \* \* We desire to say that in the granting and refusing injunctions, until the hearing, the judge of the Superior Court is clothed by the law with a discretion. If this court undertakes to reverse his judgment simply because we think the burden of the case is, on the facts, against his judgment, we should be ourselves assuming an original jurisdiction not granted to this court.—*Bonand v. Genesi*, 42 Ga., 639, 640.

Again the same court, speaking through Mr. Chief Justice Warner, said:

The granting or refusal to grant an injunction is vested by law in the discretion of the judge of the Superior Court to whom the application is made, and being so vested, it was manifestly intended that that officer should exercise that discretion, on the statement of facts exhibited to him, and this court will not interfere with the exercise of that discretion, unless some well established

rule of law or principle of equity has been violated, which is not disclosed by the record in this case.—*Jones, Drumwright & Co. v. Thatcher & Co.* 48 Ga., 83, 84.

The Supreme Court of the State of Louisiana, passing upon the question "That no appeal lies from the exercise of discretion by the judge in either granting or refusing an injunction," speaking through Mr. Chief Justice Manning, said:

It has long and often been held otherwise. This court will not interfere by anticipation with the exercise of that discretion by the inferior court, but it will review the judgment in order to ascertain whether the discretion has been properly exercised. In every case in which the law leaves anything to the discretion of a court, a sound and legal discretion is understood, and not an arbitrary one.—*Beebe v. Guinault*, 29 La. An., 795.

In the *Lighterage case* this court assigned as one of the purposes of a preliminary injunction, "to afford the court the proper time for deliberation and consideration of the questions," etc.

Whether the court of original jurisdiction desires, in a particular case, time to consider and deliberate upon the questions involved before permitting a change in the existing conditions should be for that court to determine. Its decision will depend upon whether the uncontroverted facts, or the conclusions of the court upon con-

flicting evidence, raise a fair presumption that the complainant will be entitled to a permanent injunction on final decree. It may be that the failure of the complainant, without satisfactory explanation, to file his bill in time for the court to give some consideration to the case without issuing a restraining order, will properly influence the decision. In either case the trial court exercises a discretion vested in courts of equity which ordinarily is not reviewable on appeal. Where such interlocutory orders are made reviewable by statute the exercise of such discretion by the lower court may not be reviewed and reversed unless it clearly appears that the court in refusing the injunction exercised its discretion arbitrarily or committed a grave error of law.

If this were not so, this appeal would bring the case before this court for determination *de novo*; it would be tantamount to a direct application to this court for an injunction *pendente lite*.

C. *Grounds on which injunction asked, unwarranted.*—The petition claims the relief prayed for upon three distinct grounds:

1. That there was no evidence before the Commission to support the order;
2. That the Commission was without jurisdiction to make the order; and
3. That the constitutional rights of the petitioner were violated by the order.

1. The allegations that there was no substantial evidence to support the order, and that the finding of the Commission was contrary to the indisputable character of the evidence, are expressly denied in the sworn answer of the Commission. The appellants did not present the record before the Commission and, therefore, there was no evidence before the court upon which it could determine that issues except the report of the Commission; the report states the facts and conclusions of the Commission, and completely refutes the allegations of the bill.

2. The question as to the reasonableness of the rates, involved in the first order, it has been determined by this court in many cases, is peculiarly and exclusively within the jurisdiction of the Commission.

*Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426; *Int. Com. Comm. v. Ill. Cent. R. Co.*, 215 U. S., 452; *B. & O. R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481; *Int. Com. Comm. v. Union Pac. R. Co.*, 222 U. S., 541; *Int. Com. Comm. v. C., R. I. & P. Ry.*, 218 U. S., 88, 110; *Int. Com. Comm. v. L. & N. R. Co.* 227 U. S., 88.

The jurisdiction of the commission as to question of undue discrimination in the practices of carriers is also a closed question.

*N. Y., N. H. & H. R. R. Co. v. Int. Com. Comm.*, 200 U. S., 361; *Armour Packing Co. v. U. S.*, 209 U. S., 56; *So. Pac. Co. v. Int.*

*Com. Comm.*, 219 U. S., 433; *Int. Com. Comm. v. B. & O. R. R. Co.*, 225 U. S., 306; *Houston & Tex. Ry. v. U. S.*, 234 U. S., 342; *United States v. Louis. & Nash. R. R. Co.*, 235 U. S., 314.

3. As to the allegations in the complaint of want of due process, and taking of property without compensation, no special facts were alleged in the bill from which the court could conclude that there was a violation of the constitutional rights of the appellants; on the contrary the findings of the commission that the rates fixed in the first order are reasonable and that the interswitching practice was unduly discriminatory, were binding upon the court, upon the record made; the rate charged for switching cars was initiated and fixed by the appellants and they can not claim that this rate is confiscatory as against the order. The court, therefore, could not conclude upon the record as made that there had been any violation of the constitutional rights of the appellants.

As heretofore stated, the report and the order of the commission was made on the 9th day of December, 1913, to become effective February 15, 1914, more than two months intervening. This gave the appellants ample time within which to prepare and file a bill and give the court a reasonable time to deliberate, and review the case, before the order became effective. The appellants deliberately and without excuse waited until the very last day upon

which they could file their bill and give the statutory notice, and thus required the court to act *eo instante*. If it was the intention of the appellants to put the court in a position where it would have to issue a restraining order, or decide the case without deliberation, a more effective course could not have been adopted to accomplish this purpose. Upon this record, and upon the authorities cited, we submit that the three judges who refused the restraining order, did not exercise their discretion *arbitrarily* nor did they commit any grave error of law.

The argument which succeeded the decision of the judges refusing a restraining order was made upon the theory and knowledge that the tariffs establishing the new rates and practices required by the commission's orders had been filed. The question therefore before the court was whether a preliminary injunction should thereafter be issued restraining an order already complied with.

There are grave difficulties attending the restraining or enjoining of orders of the commission which have been complied with. The tariffs having been filed in compliance with the order, the injunction could operate only upon the two-year requirement, but the old tariffs which had been canceled would not be revived. The carriers may, if the orders are enjoined, file new tariffs, restoring the old rates or putting in others, upon a 30-day notice under section 6. Under section 15 the com-

mission is given power, upon complaint or otherwise, to suspend any new tariff filed, for a period of 120 days with a further right to extend the suspension if necessary. This case could have been submitted upon final hearing in the court below, and decided upon a complete record within the time required to change the tariff, and on appeal would have reached this court by this time. In view of these conditions, and the fact that the rates and practices had been ordered in by the tribunal charged by law with the duty of determining and fixing reasonable rates and practices, we submit that it would have been improvident for the court to restrain the orders which had been complied with, before a final hearing of the case. It is only upon a final hearing that all of the facts can be properly presented and considered and the law be deliberately and properly applied.

Again, upon the facts as we have above presented them, the reasons which would lead to a denial of a restraining order apply with equal force to the granting of a preliminary injunction.

#### CONCLUSION.

In view of all these circumstances, and the facts appearing of record, we submit that the three judges did not act arbitrarily nor did they commit any grave error of law in refusing the preliminary injunction. We therefore submit that this appeal should be dismissed.

In conclusion, we call especial attention to the able opinion of the District Court, beginning at page 83 of the record.

Respectfully submitted.

JOSEPH W. FOLK,

CHARLES W. NEEDHAM,

*Counsel for the Interstate Commerce  
Commission.*

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**CASES ADJUDGED**  
**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**AT**  
**OCTOBER TERM, 1914.**

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**LOUISVILLE & NASHVILLE RAILROAD COM-  
PANY v. UNITED STATES.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF TENNESSEE.**

No. 673. Argued March 1, 1915.—Decided June 1, 1915.

The general rule is that the Appellate Court will not interfere with the decision of the Chancellor refusing an interlocutory injunction unless abuse of discretion clearly appears; where, however, the order sought to be enjoined operates to reduce revenue the Chancellor's discretion should be influenced by the fact that the decree, though interlocutory, may be the equivalent of a final decree.

The fact that irreparable injury might result from orders of the Interstate Commerce Commission, unless interlocutory injunctions might be granted restraining their enforcement, undoubtedly influenced Congress to enact the provision in the Act of October 22, 1913, for a direct appeal to this court from an order granting or denying, after notice and hearing, an interlocutory injunction.

Where appellants are able to concede that there was evidence which, although conflicting, tended to support the findings of the Commission, the practice of omitting the testimony and simply insisting in this court that the findings are insufficient to support the orders is commendable, not only as a saving of expense of printing the record but also of eliminating such testimony, as is necessarily immaterial in an appellate court which cannot reverse findings if supported by any substantial evidence, even though the evidence be conflicting.

The new Equity Rules (75, 76, 77) call for a winnowing out of the use-

less; the presentation of only relevant evidence and exhibits; the elimination of reduplications of oral and written evidence and condensation into narrative form of what is material to the issue before the court.

Where an existing freight rate is attacked, the burden is on complainant to show that it is unreasonable in fact; this rule especially applies when the rate has been in force for a long period, during which the traffic has greatly increased in volume.

Market price of property and work is affected by so many and varving factors that it is impossible to lay down fixed rules for ascertaining actual value; a common measure, however, is by comparison with amounts charged for the same article by different persons. This applies to some extent to freight charges by carriers.

Mere distance is not necessarily a determining factor in fixing freight rates; competition by water and rail and in the markets largely enter into such determination.

While mere comparison of rates does not necessarily tend to establish reasonableness of either, the finding of one of many rates to be higher than all the others may give rise to the presumption that the single rate is high; and if some of the lower rates had been prescribed by the Interstate Commerce Commission, there is a *prima facie* standard for testing the reasonableness of the rate under investigation.

The Interstate Commerce Commission having in this case, after consideration of much and varied evidence as to the rates charged on coal to Nashville, fixed the amount of the rate in light of the findings made on such testimony, and as the rate fixed is not claimed to be confiscatory, this court holds that the findings support the order fixing the rate.

An order in this case requiring a carrier to extend to connecting carriers, as to competitive business, the same switching facilities that it extends to some of the other connecting carriers, in regard to the same class of business, is not violative of the due process provision of the Fifth Amendment, nor does it violate the provision in § 15 of the Commerce Act that a carrier shall not be required to give the use of its tracks or terminals to another carrier engaged in like business. *Pennsylvania v. United States*, 236 U. S. 351.

216 Fed. Rep. 672, affirmed.

THE facts, which involve the validity of orders of the Interstate Commerce Commission establishing rates on coal and also requiring the carrier to furnish certain switching facilities to connecting carriers, are stated in the opinion.

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Argument for Appellants.

*Mr. William A. Colston, with whom Mr. Henry L. Stone, Mr. Claude Waller, Mr. John B. Keeble and Mr. Wm. A. Northcutt were on the brief, for appellants:*

If the facts found do not as a matter of law support the orders made, or if the Commission was without jurisdiction to make the orders, or if the orders result in taking appellants' property without due process of law, the interlocutory injunction should have been granted.

The facts found with respect to the coal rates do not, as a matter of law, support the order fixing rates.

The Commission was without jurisdiction to make the order fixing rates.

The enforcement of the Commission's order fixing rates takes appellants' property without due process of law.

The facts found by the Commission do not, as a matter of law, support the order as to switching practices.

The Commission was without jurisdiction to make the order as to switching practices.

The enforcement of the order as to switching practices takes appellants' property without due process of law.

The appellants have made out their case for a temporary injunction.

In support of these contentions, see *Buffalo Gas Co. v. Buffalo*, 156 Fed. Rep. 370; *Chicago Live Stock Ex. v. C. G. W. Ry.*, 10 I. C. C. 428; *Cotting v. Kansas City Stockyards*, 183 U. S. 79; *E. T., V. & G. Ry. v. Int. Com. Comm.*, 181 U. S. 1; *Fla. East Coast Ry. v. United States*, 234 U. S. 167; *Grand Trunk Ry. v. Michigan R. R. Comm.*, 231 U. S. 472; *Int. Com. Comm. v. Ala. Mid. Ry.*, 168 U. S. 144; *Int. Com. Comm. v. C., B. & Q. Ry.*, 168 U. S. 320; *Int. Com. Comm. v. C. G. W. Ry.*, 209 U. S. 108, 119; *Int. Com. Comm. v. Clyde S. S. Co.*, 181 U. S. 29; *Int. Com. Comm. v. C., R. I. & P. R. R.*, 218 U. S. 88, 101; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm. v. Dittenbaugh*, 222 U. S. 42; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 90-92; *Int. Com. Comm. v.*

*Louis. & Nash. R. R.*, 190 U. S. 273; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 73 Fed. Rep. 409; *Int. Com. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; *Int. Com. Comm. v. Stickney*, 215 U. S. 98; *Intermountain Rate Cases*, 234 U. S. 476; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *K. & I. Bridge v. Louis. & Nash. R. R.*, 37 Fed. Rep. 567; *L. R. & M. Ry. v. St. L., I. M. & S. Ry.*, 41 Fed. Rep. 559; *S. C.*, 59 Fed. Rep. 400; *Louis. & Nash. R. R. v. Siler*, 186 Fed. Rep. 176; *Louis. & Nash. R. R. v. Stockyards Co.*, 212 U. S. 139; *Louis. & Nash. R. R. v. Behlmer*, 175 U. S. 648; *Memphis Freight Bureau v. Louis. & Nash. R. R.*, 26 I. C. C. 402; *Merchants Ass'n of Baltimore v. Penna. R. R.*, 23 I. C. C. 474; *Morris Iron Co. v. Balt. & Oh. R. R.*, 26 I. C. C. 240; *New Memphis Gas Co. v. Memphis*, 72 Fed. Rep. 952; *Pac. Tel. Co. v. Los Angeles*, 192 Fed. Rep. 1009; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Raymond v. Chicago Un. Tract. Co.*, 207 U. S. 20; *Reagan v. Farmers L. & T. Co.*, 154 U. S. 362; *Slider v. Southern Ry.*, 24 I. C. C. 312, 313; *Southern Ry. v. St. Louis Hay Co.*, 214 U. S. 297; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667; *Tap Line Cases*, 234 U. S. 1; *Tex. & Pac. Ry. v. Int. Com. Comm.*, 162 U. S. 197; *United States v. La. & Pac. Ry.*, 234 U. S. 1; *United States v. St. Louis Terminal Assn.*, 224 U. S. 383; *Waverly Oil Works v. Penna. R. R.*, 28 I. C. C. 621; *Burke's Works* (11) Boston ed., 1869; 22 Cyc. 751, 755, 782, 783, 822; *High on Injunctions*, § 13, pp. 19, 20; 1 *History of English Law*, p. XXVII; 2 *Wigmore on Evidence*, § 1353, p. 1666.

The ultimate findings of fact or conclusions of the Interstate Commerce Commission as to reasonableness or discrimination are subject to judicial review.

It was not necessary nor even desirable upon the motion for an interlocutory injunction to bring up the voluminous record before the Interstate Commerce Commission.

The facts found with respect to the rate order do not, as a matter of law, support the order fixing rates, and the Commission was without jurisdiction to make that order.

The facts found with respect to the order as to switching practices do not, as a matter of law, support that order, and the Commission was without jurisdiction to make the order as to switching practices.

Extracts from the debates on the Hepburn Bill show that Congress has not changed the rule as to review of the Commission's finding of fact by the judicial power of the Government, and that the conclusions of the Interstate Commerce Commission are subject to judicial review.

Extracts from the debates on the Hepburn Bill show that the amendment of § 1 of the Act to Regulate Commerce, defining the term "transportation" was intended to prevent unjust discrimination which necessarily arises from the ownership and control of facilities of transportation by shippers and receivers of freight.

In support of these contentions, see cases *supra* and *Bowling Green v. Louis. & Nash. R. R.*, 24 I. C. C. 228; *C., M. & St. P. Ry. v. Minnesota*, 134 U. S. 456; *Nashville v. Louis. & Nash. R. R.*, 33 I. C. C. 76; *Cohens v. Virginia*, 6 Wheat. 399; *Ex parte Young*, 209 U. S. 123; *Florida East Coast Ry. v. United States*, 234 U. S. 167; *Florida Shippers v. Atl. Coast Line*, 14 I. C. C. 476; *S. C.*, 17 I. C. C. 552; *S. C.*, 22 I. C. C. 11; *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541; *In re Financial Relations &c. of Carriers*, 33 I. C. C. 168; *Lebanon Commercial Club v. Louis. & Nash. R. R. Co.*, 28 I. C. C. 301; *Mt. Pleasant Fertilizer Co. v. Louis. & Nash. R. R.*, No. 6186, before I. C. C., Unreported No. A-748; *Pennsylvania Co. v. United States*, 236 U. S. 351; *Slider v. Southern Ry. Co.*, 24 I. C. C. 312, 313; *United States v. Louis. & Nash. R. R.*,

235 U. S. 314; *United States v. Louis. & Nash. R. R.*, 236 U. S. 318.

*Mr. Solicitor General Davis* for the United States:

The granting or refusing of an interlocutory injunction is a matter in the sound discretion of the court, and is not to be reviewed unless this discretion has been abused. No such abuse here appears. *Buffington v. Harvey*, 95 U. S. 99, 100; *Thompson v. Nelson*, 71 Fed. Rep. 339; *Vogel v. Warsing*, 146 Fed. Rep. 949; *American Grain Separator Co. v. Twin City Separator Co.*, 202 Fed. Rep. 202; *Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. Rep. 603.

The order of the Commission declaring the coal rate unreasonable involves a question of fact, and is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence.

The reasonableness of a rate is a question of fact, and the finding of the Commission thereon is conclusive unless it be without substantial evidence to support it or contrary to the indisputable character of the evidence. *Ill. Cent. R. R. v. Int. Com. Comm.*, 206 U. S. 441, 455; *Int. Com. Comm. v. Chicago & Alton R. R.*, 215 U. S. 479; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm. v. C., R. I. & P. Ry.*, 218 U. S. 88, 110; *Int. Com. Comm. v. Del., Lack. & West. R. R.*, 220 U. S. 235; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294; *United States v. Louis. & Nash. R. R.*, 235 U. S. 314.

The order of the Commission as to discriminatory switching practices likewise involves a question of fact, as to which the finding of the Commission is neither without substantial evidence to support it nor contrary to the indisputable character of the evidence. Nor does it violate any constitutional or statutory right of appellants.

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Undue discrimination is a question of fact within the peculiar province of the Commission. *Int. Com. Comm. v. Alabama Midland Ry.*, 168 U. S. 144, 170; *Penna. R. R. v. International Coal Co.*, 230 U. S. 184, 196; *Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247; *United States v. Louis. & Nash. R. R.*, 235 U. S. 314.

*Penna. Co. v. United States*, 236 U. S. 351, as to switching practices, is decisive of this case.

*Mr. Charles W. Needham*, with whom *Mr. Joseph W. Folk* was on the brief, for Interstate Commerce Commission:

All the matters in controversy were cognizable by the Commission.

There was substantial evidence before the Commission to support the orders in question.

The evidence was sufficient as to reasonableness of rates involved. The orders were based upon probative evidence and were not arbitrary.

On the facts of record before it the Commission was empowered to require appellants to cease and desist from their unjust discrimination with respect to switching practices at Nashville.

The order with respect to switching practices does not deprive appellants of their property without due compensation, in violation of the Fifth Amendment to the Constitution of the United States.

There was no error in the refusal of the District Court to grant appellants' motion for an interlocutory injunction.

In support of these contentions, see *Armour Packing Co. v. United States*, 209 U. S. 56; *Atchison, T. & S. F. Ry. v. United States*, 232 U. S. 199; *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U. S. 481; *Beebe v. Guinault*, 29 La. Ann. 795; *Bonand v. Denesi*, 42 Georgia, 639; *Castoriano v. Dupe*, 145 N. Y. 250; *Chicago, M. & St. P. Ry. v. Iowa*,



233 U. S. 334; *Newton v. Levis*, 79 Fed. Rep. 715; *Colonial City Trackage Co. v. Kingston City R. R.*, 153 N. Y. 540; *Grand Trunk Ry. v. Michigan Railway Commission*, 231 U. S. 457; *Higginson v. C., B. & Q. Ry.*, 102 Fed. Rep. 197; *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Ill. Cent. Ry. v. Int. Com. Comm.*, 206 U. S. 441; *Int. Com. Comm. v. Alabama Midland Ry.*, 168 U. S. 144; *Int. Com. Comm. v. Baltimore & Ohio R. R.*, 225 U. S. 306; *Int. Com. Comm. v. C., R. I. & P. Ry.*, 218 U. S. 88; *Int. Com. Comm. v. D., L. & W. Ry.*, 220 U. S. 235; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88; *Int. Com. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; *Int. Com. Comm. v. Un. Pac. R. R.*, 222 U. S. 541; *Jones v. Thatcher*, 48 Georgia, 83; *Kelley v. Boettscher*, 89 Fed. Rep. 125; *Kerr v. New Orleans*, 126 Fed. Rep. 920; *Lighterage Cases*, 225 U. S. 306; *Louis. & Nash. R. R. v. Finn* [Jan., 1915]; *MacLaury v. Hart*, 121 N. Y. 636; *McHenry v. Jewett*, 90 N. Y. 58; *Memphis Freight Bureau v. Louis. & Nash. R. R.*, 26 I. C. C. 402; *Baltimore Merchants Assn. v. Penna. R. R.*, 23 I. C. C. 474; *Minnesota Rate Cases*, 230 U. S. 352; *Mo. Pac. Ry. v. Larabee Mills*, 211 U. S. 612; *N. Y., New Haven & H. R. R. v. Int. Com. Comm.*, 200 U. S. 361; *Procter & Gamble v. United States*, 225 U. S. 282; *Rock Island Ry. v. Rio Grande R. R.*, 143 U. S. 590; *Schneider v. Rochester*, 155 N. Y. 619; *Southern Pac. Co. v. Earl*, 82 Fed. Rep. 690; *So. Pac. Co. v. Int. Com. Comm.*, 219 U. S. 433; *Strasser v. Moonelis*, 108 N. Y. 611; *Tex. & Pac. Ry. v. Abilene Cotton Co.*, 204 U. S. 426; *Un. Pac. Ry. v. Chi. &c. Ry.*, 163 U. S. 563; *United States v. Louis. & Nash. R. R.*, 235 U. S. 314; *Wisconsin &c. R. R. v. Jacobson*, 179 U. S. 287; *Workingmen's Council v. United States*, 57 Fed. Rep. 85; *Young v. R. K. G. L. Co.*, 129 N. Y. 57.

*Mr. A. G. Ewing, Jr.*, with whom *Mr. T. J. McMorrough* was on the brief, for the city of Nashville.



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MR. JUSTICE LAMAR delivered the opinion of the court.

The Traffic Bureau of Nashville instituted proceedings before the Commerce Commission against the Louisville & Nashville, Nashville, Chattanooga & St. Louis, Tennessee Central, Illinois Central R. R. Companies, and the Nashville Terminal Company, seeking (1) a reduction of the \$1 rate on coal and (2) to require a discontinuance of what was alleged to be a discriminatory switching practice in the yard at Nashville. After an elaborate hearing, in which volumes of testimony were taken, the Commission found that the \$1 coal rate was unreasonable, and established an 80 cent rate. It also passed an order requiring the Railroad Companies to discontinue the discrimination in furnishing switching facilities. Thereupon the two Railroad Companies, first named, appellants herein, filed a bill in the District Court for the Middle District of Tennessee against the United States, the Commerce Commission and others attacking the validity of these two orders. The application for a temporary injunction having been denied the case was appealed to this court.

1. On the argument here the Appellants insisted that under the decisions in *Florida East Coast Ry. v. United States*, 234 U. S. 167; *Int. Com. Comm. v. Un. Pac. R. R.*, 222 U. S. 541; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, this court will determine whether the facts found do, as a matter of law, support the order of the Commission. The Government, on the other hand, contended that the case should be disposed of in conformity with the principle that an Appellate Court will not interfere with the decision of a Chancellor, refusing to grant an interlocutory injunction, unless it clearly appears that there has been an abuse of discretion. There can, of course, be no doubt that such is the general rule. But where the order of the Commission operates to reduce revenue it is manifest that the Chancellor's discretion should be influenced by the

fact that, though the application is for an interlocutory injunction, the decision thereon may, in many respects, be the equivalent of a final decree. On such a hearing the court should, therefore, consider that fact with all others, and grant the injunction, grant it on terms, or refuse it as the equity of the case may warrant.

It was no doubt because of the limited time in which orders of the Commission would be operative and that there might be cases in which irreparable injury would result if an interlocutory injunction was not granted, that Congress, by the Act of October 22, 1913 (38 Stat. 220) provided that "*an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction. . . .*" This clause and the reasons above mentioned were evidently taken into consideration by the three judges who heard this case. For, in passing upon the application, the court made a full statement of the facts, delivered a carefully prepared opinion discussing the various contentions of the complainants and then made a decision on the merits of the case as submitted.

2. The facts involved have been so fully stated by the Commission (28 I. C. C. 533) and by the court below (216 Fed. Rep. 672) that it is unnecessary here to repeat them. The Railroad Companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission, but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made. This most commendable practice not only saved the expense of printing many volumes of testimony, but saved the substantial points in the case from being submerged in a flood

of testimony—much of which was explanatory before the Commission and most of which was wholly immaterial in an Appellate Court which cannot reverse findings when supported by substantial—though conflicting—evidence. The practice is also in compliance with the spirit of the new Equity Rules (75, 76, 77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports; the elimination of all reduplications in written and oral testimony and a condensation into narrative form of what is material to the then issue before the court.

3. By virtue of this conformity to the rules, we are in a position to consider the sharp-cut issue as to whether, as matter of law, the Commission's findings of fact sustain its order, and shall discuss first the rate on coal which, being treated as typical, was principally argued by counsel.

Where an existing freight rate is attacked, the burden is on the complainant to establish that it is unreasonable in fact. This is especially so where, as here, the rate has been in force for a long period during which time the traffic greatly increased in volume. In order to carry this burden in the present case, the Traffic Bureau, while alleging that the rate was unreasonable in itself and by comparison with other like rates, does not seem to have attempted to prove the cost, or value of the carrier's service, but apparently relied largely on proof showing that the Nashville rate was higher than that charged for a similar haul to other points.

While some elements of value are fixed, the market price of property and work is affected by so many and such varying factors as to make it impossible to lay down a rule by which to determine what any article or service is worth. But one of the most common measures by which to value the property or service of A is to compare it with the amount charged for the same thing by B, C and D. But

this method, if made the sole basis for ascertaining values, may often lead to improper results. For B, C and D may charge too much, or they may have been forced to charge too little. The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road. But while all this be true it is, nevertheless, a fact that a comparison of rates between two points on the same road, or with the charges on other roads, may furnish evidence of probative value.

In the present case the Commission pointed out that many facts had to be considered in applying the evidence offered for the purpose of showing that the \$1 rate to Nashville was high by comparison with the charge made to other points. It found that coal was shipped over the Louisville & Nashville R. R. from Kentucky mines to Nashville, Memphis and Louisville. It also found that there was no substantial dissimilarity in the conditions at those three points and instituted a special comparison between the rates to those three cities. The result may be indicated by the following tabulation:

From Mines—

To Nash., via L. & N., 109 m., \$1 p. ton, or 9.2 mills p. m.

Memphis, “ “ “ “	276 “	1.10 “	4. “ “ “
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Louisville, “ “ “ “	142 “	.65 “	4.5 “ “ “
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The defendants insisted that its \$1.10 rate to Memphis did not furnish a fair criterion because it had been made low and reduced in order to meet competition. The commission, however, found that the *river rate* to Memphis was \$1.40 per ton so that the Appellant's "not unreasonable" (26 I. C. C. 402) rate of \$1.10 was not compelled by water competition. It further found that the rail competition at Memphis was not compelling. On these facts, and after giving a history of the increase and decrease in that rate (26 I. C. C. 402), the Commission seems to have treated the \$1.10 rate, for 276 miles to Memphis, as in the nature of a voluntary charge which would tend to indicate that the \$1 rate for 109 miles to Nashville was too high. A similar view was taken of the situation at Louisville, where water competition existed and where the 60-cent rate from the mine to Louisville, 142 miles, was practically the same as that of the Illinois Central which charged the same rate for a haul of 125 miles to Louisville.

Of course, competition by rail as well as by water may compel such a reduction in rates as altogether to destroy their value for purposes of comparison. But, as we understand, the Commission held that while there should be no parity between these cities, the rate of .60 charged by the Illinois Central for a haul of 125 miles to Louisville was, in view of all the facts, some indication of what a road like the Louisville & Nashville should charge on a haul of 109 miles to Nashville.

Among many other details briefly discussed in the report, the Commission dealt with the question of the earnings on the coal business to Nashville. It found that the Louisville & Nashville's coal cars had an average capacity of 41 tons, so that on shipments from the mines to Nashville there was a car revenue of \$41, or a per-car-mile earning of 37.78 cents. If the car was returned empty, there would be a per-car-mile earning

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of 18.87 cents. With this as a basis there was a comparison of the Nashville coal earnings with those on all traffic over the other roads entering that city. It showed:

	cents
L. & N. \$1 rate on coal to N'ville, per car-mile earnings	37.78
N., C. & St. L.,                   "       "       "       "	24.64
Illinois Central                   "       "       "       "	24.00

Average of *all traffic*, loaded and unloaded:

	cents
L. & N., per car-mile earnings.....	10.54
N., C. & St. L.,       "       " .....	10.08
Illinois Central       "       " .....	7.78
Tennessee Central   "       " .....	16.43

In addition to these comparisons of coal rates and average earnings on all traffic, loaded and empty, the Commission found that while the \$1 rate to Nashville had been in force many years, the carrying capacity of the cars had increased from 16 to 41 tons and the tractive power of engines from 660 to 1,165 tons. This practically doubled the earning capacity of fully loaded trains; and if, as argued, there has been a much larger increase in cost of labor, material, taxes and operating expenses no proof of that fact was made to the commission, for it found that "there was little more than a suggestion in the record as to the increased cost of labor and material and no attempt . . . to show operating cost." At the hearing of the application for a Temporary Injunction an affidavit was offered to show that the increase in cost of operation had largely exceeded the increase in earning capacity. But such evidence, important in itself and on the issue of reasonableness, cannot be considered here for the reason that it shifts the issue, for the case was submitted to the District Court not to pass on the facts but on the theory

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that though the conflicting evidence might sustain the finding, the *facts found* did not as matter of law sustain the order.

It further appeared in the Report and Finding of the Commission that the Nashville Bureau<sup>1</sup> had offered innumerable exhibits comparing on ton and car-mile bases the Nashville rate with that to points in the southeast and on the Ohio and Mississippi Rivers. *Among these were certain rates which the Commission had prescribed.* There was also a general comparison on the Nashville rate with the charge for coal and other commodities to Nashville and other destinations. This evidence showed that "*in all these instances the Nashville rate yields the greatest earnings.*"

Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard

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<sup>1</sup> "In support of these contentions complainants offered innumerable exhibits comparing on ton, car, and train mile bases the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi rivers from mines in Kentucky, Tennessee, and Virginia; with rates on coal prescribed by this Commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per-ton and per-car-mile rate received by defendants and other carriers on all traffic. In all of these instances the Nashville rate yields the greatest earnings. In elaborate detail defendants sought to analyze and rebut these comparisons in an endeavor to show that none was of any value in determining the reasonableness of the rate in issue."



which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate. No one of those facts was conclusive, for the character of the country through which the two roads had been built might differ. One might run through a level, thickly populated territory,—the other might have steep grades, long tunnels and a roadway expensive to maintain. The capital invested, the traffic hauled, the cost of operation and the earnings might differ, but nevertheless what was shown to be a reasonable rate on one, might, after allowing for the dissimilarity in conditions, earnings and cost, be a factor in determining the reasonableness of the rate on the other. The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the \$1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. In the light of these findings we cannot say that the facts set out in the Report, do not support the order. And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88:

“The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to the circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country.”

5. In its complaint before the Commission the Traffic



Bureau also attacked the practice of the Appellants by which, under filed tariffs, each made a charge of \$3 per car for switching *non-competitive business* between industries within the terminal limits and in conjunction with the Tennessee Central.

The Bureau insisted that this practice was discriminatory and designed to prevent the switching of coal between the Tennessee Central and private industries, located on sidings and reached through the Terminals. The defendants admitted the practice and the intention, but insisted that the Yards had never been thrown open to such business. They claimed that they had the right to the exclusive use of their own terminals and could not be required to switch cars loaded with "coal or competitive freight" to and from the Tennessee Central.

In considering this branch of the case the Commission found that the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, by reason of endorsements on bonds, and by an agreement to pay 4 per cent. on the capital stock of the Nashville Terminal Company, had leased the Yards for 999 years,—the rental being paid by the two lessees in proportion to the business done by each; That while the Louisville & Nashville owned 70 per cent. of the stock of the Nashville, Chattanooga & St. Louis, the two roads were not only separate corporate entities but were competitors at Nashville—particularly in the transportation of coal. It found that each switched for the other and both switched for the Tennessee Central, except as to "coal and competitive business." It found that such a switching practice was unreasonable and unjustly discriminatory, and that a 'reasonable practice would permit the switching of coal from the interchange of each carrier to industries on the rails of each other.' It thereupon issued an order requiring Appellants to cease the discrimination found to exist and to maintain "a practice which will permit the interswitching of such

shipments from and to the lines of each and every defendant" [including Tennessee Central].

The Appellants attack this order as being void because (1) it compels them to admit the Tennessee Central into an arrangement for operating joint terminals at Nashville under a contract guaranteeing interest on bonds and pro-rating operating expenses; (2) takes their property in the Yards without due process of law; (3) violates § 15 of the Commerce Act (34 Stat. 589) in compelling them, in effect, to make through routes and joint rates with the Tennessee Central when the appellants themselves have already established "a reasonable and satisfactory through route;" and (4) violates § 3 of the same Act which, after requiring carriers to afford equal facilities for the interchange of traffic, declares that the section "shall not be construed as requiring any such carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

These objections treat the order as being broader than its terms. The Commission did not, as in *Waverly Oil Works Co. v. Penna. R. R.*, 28 I. C. C. 626, 627, pass upon the question as to what was a proper switching charge as affected by the rental of the yard and the cost of operation. Neither did it direct the Appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the Appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter the same service that each of the Appellants furnishes the other in switching cars to industries located in and near the Yard.

Disregarding the complication arising out of joint ownership and the fact that each of the Appellants switches for the other, it will be seen that the Commission is not dealing with an original proposition, but with a condition brought about by the Appellants themselves.

Under the provisions of the Commerce Act (24 Stat. 380) the reciprocal arrangement between the two Appellants would not give them a right to discriminate against any person or "particular description of traffic." For, § 3 requires Railroad Companies to furnish equal facilities for the interchange of traffic between their respective lines . . . "provided that this should not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." If the carrier, however, does not rest behind that statutory shield but chooses voluntarily to throw the Terminals open to many branches of traffic, it to that extent makes the Yard public. Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others. This feature of the case was thus dealt with by the District Court:

"We think it clear that this order does not require the petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad, within the meaning of the proviso contained in Section 3 of the Act to Regulate Commerce, or constitute an appropriation of

such tracks and terminals for the use of the Tennessee Central Railroad.

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"There is furthermore no evidence that the switching practices prescribed will violate the constitutional provision against taking property without due process of law. See *Grand Trunk Ry. v. Michigan Commission*, 231 U. S. 468. And it may well be assumed that the petitioners will not themselves establish a switching charge so low as to be confiscatory."

The question, as to power of the Commission to make this part of the order, is settled by the decision in *Pennsylvania Company v. United States*, 236 U. S. 318, recently decided. The appellants, however, insist that that case did not involve *switching* but *transportation*; and further they claim that the Pennsylvania road was there ordered to *discontinue* discrimination—while here the appellants are required by an affirmative order to *devote* their property to the use of a parallel and competing carrier. But the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing.

In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business. As long as the Yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order—not only prohibiting discrimination—but requiring the appellants to furnish equal facilities "to all persons and corporations without undue preference to any particular class of persons." The question as to what is a proper practice, the

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amount of charge therefor and the length of time such switching service is to continue are matters not presented for decision on this record. The judgment of the District Court is

*Affirmed.*

MR. JUSTICE PITNEY concurs in the result.

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.

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